EDITOR'S NOTE

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INDEX TO APPENDICES

APPENDIX A The opinion of the United States Court of Appeals for the Fourth Circuit

APPENDIX B The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division

APPENDIX C The United States Court of Appeals for the Fourth Circuit Order Denying the Petition for Rehearing

APPENDIX D Amendments VIII and XIV to the United States Constitution and Code of Virginia Section 19.2-264.2

APPENDIX E Excerpts from the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit

175

Dennis C. Vacco, Atty. Gen. of the State of N.Y., Nancy A. Spiegel, Asst. Atty. Gen., of counsel), for respondent-appellee.

Before: WINTER, MAHONEY, and JACOBS, Circuit Judges.

PER CURIAM:

We affirm for substantially the reasons stated in Judge Curtin's opinion. *See* — F.Supp. —.

Coleman Wayne GRAY, Petitioner-Appellee,

v.

Charles E. THOMPSON, Warden, Mecklenburg Correctional Center, Respondent-Appellant.

Coleman Wayne GRAY, Petitioner-Appellant,

v.

Charles E. THOMPSON, Warden, Mecklenburg Correctional Center, Respondent-Appellee.

Nos. 94-4009, 94-4011.

United States Court of Appeals, Fourth Circuit.

Argued May 3, 1995.

Decided June 28, 1995.

Federal habeas corpus petition was filed after capital murder conviction and death sentence were affirmed on direct appeal by the Virginia Supreme Court, 233 Va. 313, 356 S.E.2d 157. The United States District Court for the Eastern District of Virginia, James R. Spencer, J., granted writ and vacated death sentence. Appeal was taken. The Court of Appeals, Wilkinson, Circuit Judge, held that: (1) aggravating factor of vileness was not unconstitutionally vague; (2) use of supplemental evidence of other killings as proof of future dangerousness did not violate due process; (3) due process did not require appointment of private investigator for defense; and (4) evidence was sufficient to support conviction.

Reversed and remanded.

K.K. Hall, Circuit Judge, concurred and filed opinion.

1. Homicide ⇐351, 357(11)

Vileness aggravating factor, justifying death sentence for murder defendant, was not unconstitutionally vague in light of limiting instruction given in *Smith* which defines depravity of mind as great moral turpitude, physical debasement surpassing ordinary malice and premeditation, and aggravated battery as battery which was more culpable than minimum needed to accomplish act of murder. U.S.C.A. Const.Amends. 5, 14; Va. Code 1950, § 19.2-264.2(1).

2. Criminal Law ⇐1208.1(6)

Evidence of criminal misconduct for which defendant has been neither tried nor convicted may be considered when deciding whether defendant's "future dangerousness" justifies death penalty. Va.Code 1950, § 19.2-264.2(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐266(4)
Habeas Corpus ⇐508
Homicide ⇐358(1)

Prosecution's use of petitioner's statements implicating him in other murders, to show future dangerousness and justify death penalty in underlying murder prosecution, did not violate due process or entitle petitioner to federal habeas corpus relief; evidence of petitioner's future dangerousness was advanced in open court, counsel could cross-examine adverse witnesses, there was no federal right to advance notice of witness' statements and, in any event, knowledge of specific evidence offered was not needed to prepare defense; petitioner was not entitled to advance notice of particular items of evidence used during sentencing. U.S.C.A. Const. Amends. 5, 14; 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐461

Federal courts may not generally create or apply new constitutional rights on unilateral review of state conviction. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇐461

Petitioner sentenced to death for state murder conviction was not entitled to federal habeas corpus relief based on state court's refusal to appoint private investigator for defense; declaring that due process entitled defendant to private investigator would be new constitutional ground and bare assertion that private investigator would have benefitted petitioner did not allege due process violation. U.S.C.A. Const.Amends. 5, 14; 28 U.S.C.A. § 2254.

6. Homicide ⇐253(2)

State capital murder conviction for execution-style shooting was supported by testimony that petitioner shot victim, that petitioner admitted shooting victim, and that petitioner, rather than accomplice, was acquainted with victim and angry with victim for firing his wife and, thus, alleged insufficiency of evidence could not be basis for granting federal habeas corpus relief. 28 U.S.C.A. § 2254.

7. Habeas Corpus ⇐404

Prosecution's failure to remit all impeachment evidence regarding prosecution witness, allegedly precluding petitioner from raising matter of prosecution witness' perjury was not "cause and prejudice" needed to obtain federal habeas corpus review of perjury claim that was otherwise procedurally barred; petitioner's counsel possessed relevant information when state habeas petition was filed but did not assert claim. 28 U.S.C.A. § 2254.

ARGUED: John H. McLees, Jr., Asst. Atty. Gen., Richmond, VA, for appellant. Paul G. Turner, Christian, Barton, Epps, Brent & Chappell, Richmond, VA, for appellee. ON BRIEF: James S. Gilmore, III, Atty. Gen., Richmond, VA, for appellant. Donald R. Lee, Jr., Virginia Capital Representation Resource Center, Richmond, VA, for appellee.

Before HALL, WILKINSON, and WILKINS, Circuit Judges.

Reversed and remanded with instructions to dismiss by published opinion. Judge WILKINSON wrote the opinion, in which Judge WILKINS joined. Judge HALL wrote a concurring opinion.

OPINION

WILKINSON, Circuit Judge:

Coleman Wayne Gray was convicted of capital murder in a Virginia court. Gray exhausted his state remedies and then petitioned for a writ of habeas corpus, alleging, *inter alia*, that his sentencing violated the Due Process Clause. On that ground the district court issued the writ, and the Commonwealth of Virginia now appeals. We reverse and remand with instructions to dismiss the petition.

I.

On the evening of May 2, 1985, Gray and his friend Melvin Tucker drove into the parking lot of a Murphy's Mart department store in Portsmouth, Virginia. They observed the store manager, Richard McClelland, inside. McClelland had recently discharged Gray's wife from her job at the store, thereby displeasing Gray, who told a friend he was "going to get" McClelland. When McClelland left work in his automobile, Gray and Tucker followed. *See Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, 172 (1987).

At an intersection, Gray pulled his car in front of McClelland's and blocked the road. Armed with a .32 caliber revolver, Gray ordered McClelland into Gray's car. Gray and his two passengers then returned to Murphy's Mart. While Tucker waited in the car, Gray forced McClelland inside the store at gunpoint. McClelland was told that if he refused to cooperate, his family would suffer. Gray and McClelland then emerged from the store with three sacks of cash containing

APPENDIX A

approximately $12,000. They joined Tucker in the car and departed. *Id.*

Gray drove to a service station and fueled the automobile. He removed a gas can from the trunk and filled it with gasoline as well. Gray then proceeded to a remote dirt road, stopped the car, and commanded McClelland to get out. Gray ordered McClelland to lie face down on the ground. As McClelland did so, he begged Gray not to hurt him. Gray assured McClelland he had nothing to fear, and then fired six bullets into the back of McClelland's head with the .32 caliber handgun. The shooting was execution style: the shots were fired in rapid succession, from a range of three to eighteen inches. Gray told Tucker as they drove away from the murder scene that he had to shoot McClelland because McClelland knew him. *Id.*, 356 S.E.2d at 172–73.

The two men then returned to the intersection where they first abducted McClelland. Gray informed Tucker that he intended to burn McClelland's car to destroy the evidence. Gray soaked the interior of McClelland's car with gasoline from the gas can, tossed a lit match into the car, and fled. Gray and Tucker returned to Gray's apartment to count the money. *Id.* at 173.

Both Gray and Tucker were subsequently indicted on various criminal counts. Tucker pleaded guilty to lesser charges in exchange for agreeing to testify against Gray. Gray, however, went to trial for armed robbery, abduction, arson, unlawful firearm use, and capital murder. In a pre-trial motion, Gray's counsel asked the court to appoint a private investigator to assist the defense, but the motion was denied. Gray's counsel also moved for discovery under Rule 3A:11 of the Virginia Supreme Court. The court issued a discovery order pursuant to that Rule and included an additional provision requiring the disclosure of exculpatory evidence.

On Monday, December 2, 1985, the guilt phase of Gray's trial began. Following a motion by the defense under *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520(Va.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983), the Commonwealth's Attorney informed the defense of evidence he planned to introduce at the penalty phase to show Gray's future dangerousness. Specifically, he stated that prosecution witnesses would testify that Gray told them he killed a mother and daughter named Lisa and Shanta Sorrell. At the guilt phase, the key issue was whether Gray was the actual triggerman in the McClelland murder. Gray chose not to take the stand but his counsel argued that it was Tucker, not Gray, who shot McClelland, while Tucker asserted just the opposite. Two witnesses for the prosecution, who had been imprisoned with Gray, testified that Gray told them he killed McClelland.

On Thursday, December 5, 1985, the jury convicted Gray on all counts. That evening, the Commonwealth's Attorney informed the defense that at the penalty phase, scheduled to begin the next morning, he intended to offer evidence of the Sorrell murders in addition to the incriminating statements that he discussed with the defense on Monday. The proposed evidence consisted of testimony by the police detective who investigated the murders, testimony by the state medical examiner who performed the victims' autopsies, and photographs and forensic evidence of the crime scene. Defense counsel interviewed the police detective over the telephone that night.

The following morning, Friday, December 6, the penalty phase began. During an in-chambers conference, Gray's counsel asked the court to exclude the additional Sorrell evidence on the ground that it exceeded the scope of corroborating evidence permissible under state law, and that they were unprepared to rebut it that day. The court expressed the view that the evidence was admissible at sentencing.

At the penalty phase, the prosecution first offered evidence of other criminal acts committed by Gray. That evidence included his criminal record, which the Virginia Supreme Court noted reflected thirteen felony convictions, at least nine of which were for violent crimes. *See Gray*, 356 S.E.2d at 179.

Tucker then took the stand on behalf of the Commonwealth and addressed the Sorrell murders. He testified that shortly after the McClelland murder, he and Gray were

scanning the local paper for news of the McClelland investigation. According to Tucker, Gray pointed to a picture of Lisa Sorrell in the paper and declared that he had killed her. At the close of Tucker's direct examination, the defense stated that it had no questions of him. The defense at that time formally moved to exclude the additional Sorrell evidence, but the motion was denied. The court noted that defense counsel had been informed of the evidence the day before.

The Commonwealth next called Detective Michael Slezak. Slezak testified that he discovered the body of Lisa Sorrell in the driver's seat of a burned-out automobile and found the body of three-year-old Shanta in the trunk. He also testified that an expended match was recovered from the interior of the car: the automobile, like McClelland's, was apparently ignited after the murder. Slezak identified several photographs of the crime scene, which were each admitted into evidence. He offered no opinion on who was responsible for the murders, however. The defense then cross-examined Slezak. The questions emphasized the highly-publicized nature of the Sorrell murders and suggested that due to the possibility of a "copycat crime," the Sorrell and McClelland murders might not have been committed by the same person.

Finally, the Commonwealth called the medical examiner, Dr. Faruk Presswalla. His statements indicated that the Sorrell murders were performed in a manner strikingly similar to that of the McClelland murder. He testified that Lisa Sorrell was killed by six .32 caliber gunshots to the back of her head, and that Shanta died from smoke inhalation. He identified autopsy photographs, which were admitted into evidence. The prosecution also introduced Dr. Presswalla's autopsy report. The defense stipulated to Dr. Presswalla's expert status and declined to cross-examine him.

The defense, in turn, called seven witnesses to present mitigating evidence. They testified largely to their favorable opinions of Gray's character. *Gray*, 356 S.E.2d at 177. Then, Gray himself took the stand. He denied any involvement whatsoever in the Sorrell murders. When asked whether he had anything he wished to say to the jury, he stated that his participation in the McClelland murder was limited to driving the car, and he swore that it was not he who pulled the trigger and killed McClelland.

The court instructed the jury on the aggravating factors under the Virginia death penalty statute—the vileness of the crime charged and the future dangerousness of the defendant. Upon deliberation, the jury unanimously found the existence of both aggravators and fixed Gray's sentence at death.

The Virginia Supreme Court affirmed Gray's conviction and sentence, *Gray*, 356 S.E.2d 157, and the U.S. Supreme Court denied certiorari. 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). Gray then instituted state habeas proceedings. The state habeas court dismissed the petition, the Virginia Supreme Court summarily affirmed the dismissal, and the U.S. Supreme Court again denied certiorari. *Gray v. Thompson*, 500 U.S. 949, 111 S.Ct. 2250, 114 L.Ed.2d 491 (1991).

Thereafter, Gray filed the instant petition for a writ of habeas corpus. He alleged numerous constitutional violations with respect to both phases of the trial. The district court held an evidentiary hearing and heard testimony from trial counsel and the prosecution witnesses as to the events at sentencing. Of particular interest to the district court was Detective Slezak's testimony that Timothy Sorrell, Lisa's husband, had been an initial suspect in the Sorrell murders, although upon further investigation he was not charged. The district court granted the writ and vacated Gray's sentence, finding that the prosecution had "violated the moral standards of fair play embodied in the Due Process Clause" by unfairly surprising the defense with the additional Sorrell evidence. The decision was stayed pending this appeal.

II.

The primary challenges to Gray's sentence involve the aggravating factors found by the jury. Petitioner asserts that the vileness element as applied to him was unconstitutionally vague under *Godfrey v. Georgia*,

U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). He also contends that use of the supplemental Sorrell evidence as proof of future dangerousness was unconstitutional under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). We hold that the district court properly rejected the former claim, but that it erred in issuing the writ based on the latter.

A.

[1] We first address the vileness factor. Virginia law provides that a jury may impose the death sentence if it finds that the conduct "for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2(1). To pass muster under *Godfrey*, a sentencing factor must be sufficiently limited to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" 446 U.S. at 428, 100 S.Ct. at 1765. Even before *Godfrey* was decided, however, the Virginia Supreme Court provided a narrowing construction of the vileness provision. *See Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978) (defining depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" and aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Here, the court gave the *Smith* definitions to the jury essentially *verbatim*, and the jury found unanimously that Gray's murder of McClelland satisfied the vileness predicate.

We have repeatedly held that limiting instructions based on *Smith* meet the constitutional standard set forth in *Godfrey*. *See Turner v. Williams*, 35 F.3d 872, 891–92 (4th Cir.1994); *Jones v. Murray*, 976 F.2d 169, 174–75 (4th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 27, 120 L.Ed.2d 951 (1992); *Jones v. Murray*, 947 F.2d 1106, 1117 (4th Cir. 1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir.1989), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2193, 109 L.Ed.2d 521 (1990); *Turner v. Bass*, 753 F.2d 342, 350–53 (4th Cir.1985), *reversed in part on other grounds*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). It is manifest that *Godfrey* does not demand more. *See Turner v. Bass*, 753 F.2d at 353 ("*Godfrey* [does not] require[ ] that a jury be instructed on each term in the aggravating circumstances.").

B.

[2] We next turn to the question of future dangerousness.[1] Virginia also permits the death penalty if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va.Code § 19.2-264.2(1). In considering the defendant's potential violence, the Virginia jury has never been restricted to proof of adjudicated criminal convictions. To the contrary, the Commonwealth may introduce evidence of criminal misconduct for which the defendant has been neither tried nor convicted. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 435 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986). This rule of latitude—which also allows the defendant to present a wide range of mitigating evidence—was fashioned pursuant to the Supreme Court's instruction that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d

1. Petitioner and the Commonwealth disagree about the effect of a holding that the future dangerousness finding was invalidated by the additional Sorrell evidence. Petitioner contends that it would vitiate the entire sentence, whereas the Commonwealth argues that the sentence could be supported by the independent jury finding of vileness. *See Zant v. Stephens*, 462 U.S. 862, 887 n. 24, 103 S.Ct. 2733, 2748 n.24, 77 L.Ed.2d 235 (1983); *Briley v. Bass*, 750 F.2d 1238, 1245 n. 12 (4th Cir.1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). In view of our disposition of the future dangerousness claim, *infra*, we need not reach this question.

859 (1976); *see Gray*, 356 S.E.2d at 175 (relying on *Gregg*); *Watkins*, 331 S.E.2d at 435–36 (relying on *Jurek v. Texas*, 428 U.S. 262, 275–76, 96 S.Ct. 2950, 2957–58, 49 L.Ed.2d 929 (1976)).

[3] In the instant case, petitioner claims that the future dangerousness verdict is invalid because he was unfairly surprised by the additional Sorrell murder evidence, and that effective rebuttal of the prosecution's evidence was thereby precluded. Petitioner and his counsel knew at the outset of the guilt phase that he would be accused of the Sorrell murders in penalty proceedings, however, and were informed of the additional evidence the night before that phase began. Thus, the precise rule petitioner seeks is a constitutional entitlement to *adequate advance* notice of *particular* items of evidence.

[4] In *Caspari v. Bohlen* the Supreme Court made clear that federal courts *must* analyze whether a habeas petitioner seeks to extend the boundaries of existing law before considering the merits of the claim, if the state so argues. — U.S. —, —, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994). The district court, however, never acknowledged this mandatory framework in its final opinion. We now address the question, and we find that petitioner's rule would be novel even today and certainly was not compelled by existing precedent at the time his conviction became final. *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990). Because federal courts generally may not create or apply new constitutional rights on collateral review, *id.* at 487, 110 S.Ct. at 1259, petitioner's claim must fail.

Petitioner relies largely on *Gardner v. Florida*, *supra*, for the proposition that use of the Sorrell evidence violated the Due Process Clause. That case, however, does not dictate the conclusion that petitioner had a constitutional right to some minimum amount of advance notice of the particulars of the prosecution's penalty case. In *Gardner*, the judge relied on confidential portions of a presentence report in deciding to sentence the defendant to death, but never disclosed that information to the defense until judgment was entered. 430 U.S. at 353, 97 S.Ct. at 1202. Because the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain," the sentencing proceeding was unconstitutional. *Id.* at 362, 97 S.Ct. at 1207.

Petitioner, by contrast, was not sentenced on the basis of any secret information. Rather, the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was specifically afforded the chance to cross-examine the adverse witnesses. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949) (no due process violation where judge discussed sentencing evidence in open court, even though some of the evidence was not previously disclosed to the defense). Indeed, defense counsel cross-examined Detective Slezak, who had been interviewed the preceding evening, and chose not to cross-examine Dr. Presswalla after stipulating to his competence. If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded. And, after the supplemental Sorrell evidence was presented, petitioner took the stand and directly addressed the jury. Plainly, petitioner *had* an opportunity to explain or deny the evidence. This case is thus distinguishable from *Gardner* on first principles. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir.1982) (explaining that *Gardner* "simply prohibits the use of 'secret information'; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal."), *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983).[2]

Gardner itself warned against broad expansions of its holding. Although *Gardner* extended the guarantee of due process to the sentencing context, the extension was carefully circumscribed. The fact that due process applied at sentencing did not transport

2. It follows that this is not a case in which we are asked merely to "apply an extant normative rule to a new set of facts," *Turner v. Williams*, 35 F.3d 872, 885 (4th Cir.1994), as the rule in *Gardner* does not apply even generally to this case.

into that phase of capital proceedings "the entire panoply of criminal trial procedural rights." 430 U.S. at 358 n. 9, 97 S.Ct. at 1205 n. 9. Notably, there is no right to advance notice of witness statements, much less to evidence that merely corroborates such statements, in federal trials. Witness statements are not discoverable until after the witness has testified on direct examination. *See* 18 U.S.C. § 3500(a). This practice has, to our knowledge, never been found to offend the Due Process Clause. In light of the fact that *Gardner* expressly avoided importing even established trial rights into sentencing, it is implausible that it created sentencing rights that are nonexistent at trial. In sum, *Gardner* did not clearly forbid the jury from sentencing petitioner on the basis of the Sorrell evidence.

The district court's justification for relying on *Gardner* is in error. In applying *Gardner* to the facts of this case, the district court cited a passage from *Smith v. Estelle*, 602 F.2d 694 (5th Cir.1979), *aff'd on other grounds*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), in which the Fifth Circuit reasoned that "[s]urprise can be as effective as secrecy in preventing effective cross-examination" and thus denying defense counsel the opportunity to challenge prosecution evidence. *Id.* at 699. The *Estelle* decision was based on *Gardner*. *Estelle*, however, is a habeas case that was decided before the Supreme Court limited the formulation of new rules on collateral review. *See Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Extending the holding of *Gardner*, which involved a complete failure to disclose, to a case in which disclosure was made but allegedly so late as to be unfair, requires the analytical equation of "secrecy" and "surprise." While the *Estelle* court may have been free to make that leap in extending *Gardner*, such analysis is no longer permissible on collateral review. *See Caspari*, — U.S. at —, 114 S.Ct. at 967.

Not only is petitioner's position not mandated by *Gardner*, but other precedent existing at the time his conviction became final counsels affirmatively against it. In *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), the Supreme Court held that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Id.* at 559, 97 S.Ct. at 846. As *Weatherford* explains, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), created a constitutional right to exculpatory evidence, but not to all information that might be helpful in preparing for trial. 429 U.S. at 559, 97 S.Ct. at 845; *see also United States v. Agurs*, 427 U.S. 97, 109–10, 96 S.Ct. 2392, 2400–01, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense."). Here, the prosecution had already responded to the *Brady* segment of the pre-trial discovery order when the defense requested the penalty evidence. Beyond that, *Weatherford* reiterates, " 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' " 429 U.S. at 559, 97 S.Ct. at 846 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973)). The federal circuits have taken their cue from this precedent and have narrowly construed the requirements of due process in the context of discovery challenges. *See e.g., United States v. Polowichak*, 783 F.2d 410, 414 (4th Cir. 1986); *United States v. Kendall*, 766 F.2d 1426, 1440–41 (10th Cir.1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986); *United States v. Brown*, 628 F.2d 471, 473 (5th Cir.1980). Thus, rather than deeming petitioner's claim to be iron-clad, a reasonable jurist might well have found that the Supreme Court and several circuits had affirmatively rejected arguments similar to petitioner's.

The practical import of the rule sought by petitioner underscores its novelty. If the Due Process Clause entitled defendants to some minimum advance notice of ancillary evidence, federal courts would be thrust deep into state criminal proceedings. The general scope of discovery at such trials, however, represents precisely the type of question that has traditionally been left to the states. *See Herrera v. Collins*, — U.S. —, —, 113 S.Ct. 853, 864, 122 L.Ed.2d 203 (1993). Here, for instance, the prosecution notified the defense of its penalty evidence, including

Gray's incriminating statements, not pursuant to any perceived mandate of due process but according to Virginia's "preferred practice." *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d at 526 (prosecution may proffer evidence of unadjudicated criminal conduct to show future dangerousness, but "[i]n fairness to the defendant ... the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty"). State practices of criminal procedure are reviewed on habeas with substantial deference. *Herrera*, — U.S. at —, 113 S.Ct. at 864. Indeed, the doctrine announced in *Teague* and developed in its progeny is based in part on comity in federal-state relations. *See Teague*, 489 U.S. at 310, 109 S.Ct. at 1075 (noting detrimental impact on states of retroactive application of new rules of constitutional law on habeas corpus). To supplant Virginia law on the particulars of criminal discovery with the Fourteenth Amendment, and increase the present discovery obligations on the state, is something we may not do on collateral review. *See Penry v. Lynaugh*, 492 U.S. 302, 314, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (1989) (noting that new rule is one which imposes additional duties on the states).

Finally, petitioner's contention rings hollow on its facts. The prosecution informed the defense on Monday morning that it intended to present evidence of statements by Gray that would implicate him in the Sorrell murders. That testimony was, of course, the linchpin of the government's proof of those crimes. Knowledge of the particular evidence the prosecution would offer to support that testimony, i.e., to show that the murders actually occurred, was simply not necessary to prepare a defense against the general charge of petitioner's guilt. Petitioner has advanced no meaningful way in which he would have proceeded any differently at the penalty phase had he known about the photographs, the autopsy report, and the like, before Thursday evening; indeed, it seems likely that petitioner's case would have unfolded in much the same fashion that it did.[3] *Accord Weatherford*, 429 U.S. at 561, 97 S.Ct. at 846.

For the foregoing reasons, petitioner is not entitled to habeas relief on the ground that he did not receive sufficient notice of the evidence in question.[4]

III.

Petitioner offers several alternative grounds for affirming the issuance of the writ. We find none persuasive.

[5] First, petitioner contends that the state court's refusal to appoint a private investigator for the defense contravened due process. The Supreme Court, however, has flatly declined to address the question whether, "as a matter of federal constitutional law[,] what if any showing would [entitle] a defendant to [private] assistance." *Caldwell v. Mississippi*, 472 U.S. 320, 323–24 n.1, 105 S.Ct. 2633, 2637 n.1, 86 L.Ed.2d 231 (1985). By resolving that question, we would clearly be breaking new constitutional ground. *See Jackson v. Ylst*, 921 F.2d 882, 885–86 (9th Cir.1990) (declining to address same question). In any event, petitioner has offered

3. Petitioner devotes extensive portions of his brief to Timothy Sorrell's status as an initial suspect in the Sorrell murders, arguing that had he known of that fact he could have better defused the charge leveled against him. We refuse to be dragged into a mini-trial on the respective strengths of the cases against Sorrell and petitioner. Our sole commission on collateral review is to review the state trial record for violations of federal law. *See* 28 U.S.C. § 2254(a). Once we have satisfied ourselves that no such error occurred, we are not at liberty to reconduct state proceedings on federal habeas corpus. As the Supreme Court noted in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), state trials on the merits should be "the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.* at 90, 97 S.Ct. at 2508.

4. Petitioner's claim does not begin to approach either of the excepted categories that permit relief on the basis of novel doctrine. The rule petitioner seeks to establish would not place private conduct beyond the scope of lawful prosecution. *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990) ("The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule [petitioner seeks]."). Nor is the rule fundamental to our system of ordered liberty. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

nothing more than a bare assertion that private assistance would have been beneficial to him, which does not state a violation of due process. *Caldwell*, 472 U.S. at 323–24 n. 1, 105 S.Ct. at 2637 n.1.

[6] Next, petitioner argues that the evidence at the guilt phase of the trial was insufficient to convict him of capital murder. He complains, in essence, that there was no direct evidence that he fired the fatal shots. However, a rational juror could well have found beyond a reasonable doubt that Gray was the triggerman. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The jury heard Tucker testify unequivocally that Gray shot McClelland, and the jury also heard testimony from two other witnesses that Gray said he murdered McClelland. Moreover, the prosecution showed that Gray, not Tucker, was acquainted with McClelland, and that Gray was angry with McClelland for firing his wife. The evidence established an ample basis for Gray's conviction.

[7] Last, petitioner asserts that the district court erred in dismissing as procedurally defaulted two other claims: that the prosecution failed to fully disclose impeachment evidence regarding a prosecution witness, Jeremiah Smallwood, and that Smallwood perjured himself. Because petitioner did not raise these arguments in the Virginia courts either at trial or on direct appeal, they would be procedurally barred from state collateral review. *Fitzgerald v. Bass*, 6 Va.App. 38, 46–50, 366 S.E.2d 615, 620–21 (1988), *cert. denied*, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975). The claims are thus likewise barred from federal habeas review, absent a showing of cause and prejudice. *Teague*, 489 U.S. at 298–99, 109 S.Ct. at 1068–69; *Wainwright v. Sykes*, 433 U.S. 72, 87–91, 97 S.Ct. 2497, 2506–09, 53 L.Ed.2d 594 (1977). Petitioner's sole argument on that score is that the prosecution's failure to remit all the impeachment evidence precluded him from raising that claim at trial or on appeal, because he could not have known that the disclosure was incomplete until the omitted evidence became available. This does not justify petitioner's failure to allege the issue in state court, however, because at the time the state habeas petition was filed, petitioner's counsel possessed the relevant material but did not assert the claim. *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S.Ct. 1454, 1471, 113 L.Ed.2d 517 (1991).

IV.

The judgment of the district court is hereby reversed and the case is remanded with directions that the petition be dismissed.

REVERSED AND REMANDED.

K.K. HALL, Circuit Judge, concurring:

I join in all of the majority's opinion except for Section II–B, in which the majority concludes that Gray's due process challenge to the sentencing jury's finding of future dangerousness is procedurally barred by the "new rule" doctrine. Although I express no opinion as to the precise rule Gray seeks or whether it would indeed be a "new" one for *Teague* purposes, I believe that it is at least arguable, were we to grant the relief requested, that the rule to emerge would have been dictated by *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In *Gardner*, Justice Stevens noted that a defendant has "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* at 358, 97 S.Ct. at 1205 (*citing Witherspoon v. Illinois*, 391 U.S. 510, 521–23, 88 S.Ct. 1770, 1776–78, 20 L.Ed.2d 776 (1968)). Where, as here, a habeas petitioner complains that he has been intentionally and unfairly ambushed by the state's belated disclosure of the scope of the evidence to be introduced against him at sentencing, *Gardner* teaches us that it is not enough to conclude that earlier notice would have rendered his defense only marginally more effective; we must instead inquire whether the prosecution has met its affirmative obligation to act with integrity—in other words, to play fair.

I do not say that habeas petitioners alleging a due process violation may avoid the *Teague* bar in every case simply by asserting that the state has not "played fair"; the rule in *Gardner*—whatever it may be—is not so broad. However, by narrowly articulating the rule Gray seeks as "a constitutional entitlement to adequate advance notice of particular items of evidence," *ante* at —— (emphases deleted), the majority has very likely fallen into the trap described in *Turner v. Williams*, 35 F.3d 872 (4th Cir.1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995). In *Turner*, we warned that the extant rule for *Teague* purposes will not often be "the most specific conclusion or holding [the petitioner] hopes we reach." *See id.* at 883 (emphasis in original deleted); *see also Ostrander v. Green*, 46 F.3d 347, 354 (4th Cir.1995) (framing "rules" too narrowly permits respondents to erect the *Teague* bar in almost every case).*

Although the majority correctly notes that if the respondent pleads the *Teague* procedural bar, a court must resolve the issue prior to considering the merits of the claim, *ante* at —— (*citing Caspari v. Bohlen*, —— U.S. ——, ——, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994)), there is no reason to address the *Teague* issue where the denial of relief may rest upon an alternative procedural ground. In the instant case, the district court ordered an evidentiary hearing to develop the facts respecting the state's presentation of the Sorrell murder evidence; the court then granted relief based on the evidence adduced at the hearing.

Because Gray clearly failed to request that evidence regarding this matter be taken by the state habeas court, I would hold his claim to be procedurally barred by the rule in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11–13, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992). Under *Tamayo-Reyes*, a petitioner who has failed to develop the evidentiary record in his state proceeding must demonstrate cause and prejudice as a prerequisite for receiving a federal hearing. Because Gray has failed to satisfy the cause-and-prejudice standard, the district court was powerless to grant his petition on the basis of newly developed facts.

* We have previously stated that "[b]ecause *Teague* and its Supreme Court progeny ... have sent somewhat inconsistent signals, the circuit courts have had difficulty in coherently following these cases." *Turner*, 35 F.3d at 887 n. 16 (*quoting* 8C James W. Moore et al., *Moore's Federal Practice*

FILED
AUG 25 1994
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COLEMAN WAYNE GRAY,)
Petitioner,)
v.) Civil Action No. 3:91CV693
CHARLES E. THOMPSON,)
Respondent.)

MEMORANDUM OPINION

THIS MATTER is before the Court on petitioner Coleman Wayne Gray's application for habeas corpus relief, pursuant to 28 U.S.C. § 2254. Mr. Gray challenges his December 5, 1985 conviction and subsequent sentencing by the Circuit Court of the City of Suffolk, Virginia, for capital murder.[1]

On May 26, 1993, the Court issued a Memorandum Opinion which granted in part, and denied in part, the Petitioner's Motion to Alter or Amend Judgment. An evidentiary hearing was ordered on one claim: whether the introduction of evidence pertaining to the Sorrell murders during the penalty phase of Gray's trial violated the Petitioner's Fourteenth Amendment right to due process.

The parties filed briefs on this issue, and the Court held an evidentiary hearing on April 21-22, 1994. The case now is ripe for adjudication.

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[1] Mr. Gray also was convicted of Use of a Firearm in the Commission of Murder. He was sentenced to four (4) years imprisonment on this charge.
The claim of error addressed in this Memorandum Opinion relates only to Gray's capital murder charge, and does not affect his other conviction.

APPENDIX B

I.

The facts surrounding the crimes for which petitioner Gray was convicted are set forth in the Supreme Court of Virginia's opinion on direct review, Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157, cert. denied 484 U.S. 873 (1987), and in this Court's April 1, 1993 Memorandum Opinion. The salient details may be summarized as follows:

Richard McClelland, the manager of a Murphy's Mart Store in Portsmouth, Virginia, worked from 10:00 a.m. into the evening on May 2, 1985. That night at approximately 9:30 p.m., Coleman Gray and Melvin Tucker parked outside the convenience store. Both were "high" from "free basing" cocaine, and they watched McClelland and a security guard work for a significant period of time.

Shortly before midnight, McClelland and the security guard left the store. Each man got into his own automobile, and both drove to a nearby fast-food restaurant. Gray and Tucker followed the men to the restaurant. McClelland walked inside the establishment to eat; the security guard proceeded to the "drive thru" and picked up his food.

After finishing, McClelland returned to his car, and began driving towards Smithfield, Virginia. Gray and Tucker resumed their pursuit. At a stop sign on the corner of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his car in front of McClelland's and blocked the roadway. Gray, who was brandishing a .32 caliber revolver, forced McClelland out of his car, into Gray's car, and took the victim's wallet. Gray and Tucker then drove McClelland back to the Murphy's Mart Store.

Upon arrival, Gray forced McClelland to open the store. Tucker remained in Gray's car. The two men inside the store opened the safe and filled three bags full of money. After transferring the cash to Gray's car, the men forced McClelland back into the automobile.

Gray then drove to a service station to fill up his car with gasoline. The Petitioner also filled up a gas can which he placed in the trunk of his car. After paying for these purchases, Gray drove to the Frederick Campus of Tidewater Community College. The Petitioner turned onto a side road near the college, and ordered McClelland out of the car. The store manager walked fifteen to twenty feet away from the car, and, pursuant to Gray's order, laid face down on the ground. McClelland begged Gray not to shoot him or harm him in any way. After reassuring McClelland, Gray fired six shots in rapid succession into McClelland's head.

Gray and Tucker then returned to the intersection where McClelland's car was located. In order to destroy this evidence, Gray took the can of gasoline out of his trunk, and covered McClelland's car. After igniting the fire, the pair returned to Gray's apartment to count the money they had stolen.

Several days later, Tucker took Gray to the Nansemond Treatment Plant, where he worked. Gray threw the revolver he had used to kill McClelland into a contact tank. (Gray later showed the police where he had discarded the evidence and the gun was recovered.)

The police discovered McClelland's body only a few hours after the grisly murder. The autopsy revealed that six close-range .32

caliber gunshot wounds to the head had caused McClelland's death. Coleman Gray and Melvin Tucker were arrested and indicted for the capital murder of Richard McClelland. Judge Godwin, the senior Circuit Court Judge of Suffolk County, appointed Mr. James Moore and Mr. Ward Eason to represent the Petitioner.

Prior to the commencement of the Defendants' trial, Gray's attorneys moved for the appointment of an investigator to help them fully and adequately prepare the Petitioner's defense. These motions were denied by the general district court and by the circuit court. See Pet. Ex. 13 & 14. In November, 1985 Gray also filed a pre-trial discovery motion, which sought the disclosure of all exculpatory evidence. See Pet. Ex. 12. Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murders.[2] Tr. of 4/21/94 at 76-77.

Perhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. Id. at 73. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder.

Before the trial commenced, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. See Pet. Ex. 8. In exchange for Tucker's testimony against his co-defendant, the Commonwealth agreed to try Gray on a capital murder charge, and to

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[2] None of the Sorrell murder evidence was available for examination.

prosecute Tucker only for first-degree murder.[3]

On December 2, 1985, the trial of Gray and Tucker began. This proceeding was Commonwealth's Attorney Ferguson's first capital murder trial. Tr. of 4/21/94 at 206. At the outset of the proceeding, Mr. Moore, one of Gray's attorneys, asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced at the penalty phase if defendant Gray was found guilty. Jt. App. Vol. 1 at 278. Moore based his request on Peterson v. Commonwealth, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), which established that the fair and preferred practice in capital murder trials is for the Commonwealth's Attorney to reveal the evidence to be presented at the penalty phase prior to the trial. Mr. Ferguson stated he intended to introduce evidence of statements Coleman Gray had made about other crimes he had committed. Jt. App. Vol. 1 at 279. The following conversation transpired:

> Mr. Moore: Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument. . . If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal purposes. It's absolute dynamite.
>
> Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record. . . The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.
>
> The Court: Who is the other murder that we're taking about?
>
> Mr. Ferguson: A murder in California.
>
> The Court: Any name?
>
> Mr. Ferguson: Don't have a name, but a statement that the defendant made that he had committed that murder. . .The evidence is that we are going to introduce evidence to show that your client has been involved in other murders, including the Sorrell murders and including a murder in California as well as potentially other crimes.
>
> Mr. Moore: Is it going to be evidence or just his statement?
>
> Mr. Ferguson: Statements that your client made.
>
> Mr. Moore: Nothing other than statements?
>
> Mr. Ferguson: To other people, that's correct. Statements made by your client that he did these things.

Id. at 279-82.

Mr. Ferguson did not disclose to whom Coleman Gray allegedly had made statements or the context of the statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area. Tr. of 4/21/94 at 46, 92, 96. In December, 1984 Lisa Sorrell and three-year old Shanta Sorrell were abducted from Greenbrier Mall in Chesapeake, Virginia. Five days later, Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. Id. at 97. She had been shot in the head six times by a .32 caliber

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[3] Philip Ferguson testified at the April 21, 1994 hearing that he didn't believe Melvin Tucker ever had been charged with capital murder. Tr. of 4/21/94 at 243. However, petitioner's Exhibit 8 clearly demonstrates that Tucker was arrested and originally faced a capital murder charge. Id. at 248.

firearm. Shanta, who apparently died of carbon monoxide inhalation, was found in the trunk of her mother's car.

On December 5, 1985 after all of the evidence concerning the McClelland murder had been presented, and the instructions had been given, the jury retired. That same day, the jury found Coleman Gray guilty on all counts. Defendant Gray's punishment on the robbery charge and the abduction charge were each set at life imprisonment. Gray's punishment on the arson charge was ten (10) years, and he was given four (4) years on each of the firearm charges.

On December 6, the separate penalty trial mandated in capital murder cases began. See Va. Code Ann. § 19.2-264.4 (Michie 1990 & Supp. 1994). The attorneys met in Judge Godwin's chambers that morning. Mr. Moore informed the court that the previous evening, Philip Ferguson had disclosed for the first time that he intended to introduce evidence about the Sorrell murders, other than statements allegedly made by Gray to fellow inmates. Jt. App. Vol. 11 at 996-1001; Tr. of 4/21/94 at 83. Despite the Commonwealth Attorney's previous unequivocal pledge that the only evidence to be introduced was certain **statements** made by Gray, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims;[4] and 3) the medical examiner who investigated the

[4] Officer Slezak testified that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. Tr. of 4/21/94 at 120.

cause of death and the nature and extent of the Sorrell's injuries.

Gray's attorneys informed the Court they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut certain statements allegedly made by Gray to fellow inmates. Tr. of 4/21/94 at 44-45. Despite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders. Jt. App. Vol. II at 996-1001, 1051-56.

The Commonwealth called Melvin Tucker to testify. Tucker was Gray's accomplice, and a man who had escaped prosecution for capital murder in exchange for his testimony. In May, 1985 while Tucker and Gray were looking for newspaper articles which discussed the McClelland murder, Gray allegedly pointed to an article with a picture of the Sorrells. The Petitioner then admitted that he had "knocked off" Lisa Sorrell. Id. at 774-75. The Sorrell murders had occurred on December 4, 1984, nearly six months earlier. No such newspaper article ever has been introduced into evidence.

Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders. The Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders, to testify. Officer Slezak presented evidence that the murders had actually occurred, by identifying various graphic photographs of the automobile and the victims. These photographs were admitted into evidence. Id. at 1056-78; See Pet. Ex. 10 (Tr. Ex. 45-56).

Officer Slezak failed to tell the jury that Timothy Sorrell,

the victim's husband, was the primary and only suspect in the case for a substantial period of time. Tr. of 4/21/94 at 45. At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall on the evening of the murders, ignored the Nixons when they saw him at the Greenbrier Mall, made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. Id. at 101-03, 116. The police also designated Timothy Sorrel as their sole suspect on the evidence they sent to labs to be analyzed. See Pet. Ex. 3A-G (Certificates of analysis).

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. Id. at 112, 114-15.

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. Id. at 302, 309. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. See Pet. Ex. 1-2; Tr. of 4/21/94 at 315-16, 421.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week

prior to Lisa's death, a man possessing stolen merchandise came to the Sorrell's home. Tr. of 4/21/94 at 281. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. Id. at 422. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell. Id. at 117-18.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. Tr. of 4/21/94 at 53. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." Id. at 218, 238. Such an assertion is patently absurd.[5]

Finally, Dr. Presswalla, the state medical examiner who performed the victims' autopsies, testified as to the victims' cause of death. Jt. App. Vol. II at 1069-77. The doctor's statements demonstrated that the Sorrell murders were accomplished

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[5] On the date of the Sorrell murders, Melinda Gray, the Petitioner's wife, had a dinner break from Murphy's Mart from 4:29 to 5:30. In order to determine whether Coleman Gray could pick up his wife, drive to the Greenbrier Mall, commit the crime, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the Mall and Murphy's Mart. At 3:00 p.m., it took Slezak approximately twenty-three minutes to travel one way between the locations. Investigator Alfred Brown drove this same route between 4:00 p.m. and 6:00 p.m., the time the murders were committed, and it took him over forty-three minutes. Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated. Tr. of 4/21/94 at 409.

in a manner strikingly similar to the style of the McClelland murder.

Gray's attorneys were not able to effectively cross-examine any of the witnesses who testified concerning the Sorrell murders. Tr. of 4/21/94 at 66-67, 86-87; Jt. App. Vol. II at 1066-69, 1077. The only Sorrell murder evidence which they were prepared to challenge was the evidence Philip Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders.

Petitioner Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, the Petitioner denied being the triggerman, and blamed the killing on his accomplice. Jt. App. Vol. III at 1137-38. Gray flatly denied any involvement in the Sorrell murders.[4] Id. at 1138. Gray also called seven witnesses who presented mitigating testimony on his behalf.

After the admission of all of the penalty phase evidence, the jury again retired to deliberate. The jurors unanimously fixed Gray's punishment at death. Following the sentencing hearing, on January 27, 1986 Judge Godwin sentenced Mr. Gray to death. Coleman

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[4] In July of 1985, officer Slezak interviewed Coleman Gray. Slezak lied to the Petitioner, and told him that Timothy Sorrell was about going to be tried for the Sorrell murders. The officer asked for Gray's assistance because he claimed there was evidence which would implicate Gray in the murder, and he needed Gray to provide an explanation.

Gray denied any involvement and, without being under any compulsion to cooperate, agreed to provide fingerprint samples.

Slezak then lied again to Mr. Gray, and told him that one of his fingerprints matched a sample taken from the Sorrell murder scene. Mr. Gray's insistence that he did not commit the crime did not waiver.

Gray's execution was set for April 28, 1986.

To date, no one ever has been charged with or tried for the Sorrell murders. Tr. of 4/21/94 at 200.

II.

The Supreme Court has recognized many times that the death penalty is a qualitatively different form of punishment than any other that can be imposed. Gregg v. Georgia, 428 U.S. 153, 185, 96 S. Ct. 2909, 2931 (1976); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976); Hutchins v. Garrison, 724 F.2d 1425, 1429 (4th Cir. 1983). The state's act of taking the life of a citizen differs dramatically from any other legitimate state conduct. Precisely because of the terminal nature of this penalty, this Court and every other federal and state court must be exceedingly careful to insure that prior to imposing a sentence of death, every individual receives the full force of the protections and safeguards guaranteed by the United States Constitution. Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991); Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114 (1987); California v. Brown, 475 U.S. 1301, 1304, 106 S. Ct. 1367, 1368 (1986); Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) (holding that if a person is to be executed, it should be as a result of a decision based upon reason and reliable evidence).

Petitioner Gray argues that he was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his

penalty phase. Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

The Court is compelled to agree with petitioner Gray. It is established beyond question that the penalty phase of capital trial must comport with Due Process Clause of Fourteenth Amendment. See Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204-05 (1977); Witherspoon v. Illinois, 391 U.S. 510, 521-23, 88 S. Ct. 1770 (1968); United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Therefore, the defendant has a legitimate interest in the character of his sentencing proceeding, even if he has no right to object to the result of the hearing. Presnell v. Georgia, 439 U.S. 14, 16, 99 S. Ct. 235, 236 (1978); Gardner, 430 U.S. at 359.

Specifically, the Due Process Clause does not allow the execution of a person "on the basis of information which he ha[s] no opportunity to deny or explain." Simmons v. South Carolina, 114 S. Ct. 2187, 2192 (1994) (citing Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948); Balwin v. Hale, 68 U.S. 223, 233, 17 L.Ed. 531 (1863). Therefore, although in an ordinary case a defendant could be sentenced based upon information which was not disclosed to the defendant or his attorneys, Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949), the Supreme Court has recognized that such a procedure is not acceptable in death penalty cases. Gardner v.

Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977); Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979).

The constitutional defect in Gray's penalty phase hearing - that the Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla - violated Gray's right to fair notice and rendered the hearing clearly unreliable. The essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing. When a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. See, e.g., Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723 (1991) (holding petitioner's lack of adequate notice created an impermissible risk that the adversary process may have malfunctioned).

As the Fifth Circuit Court of Appeals explained in Smith v. Estelle, "Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that 'debate between adversaries [which] often is essential to the truth-seeking function of trials.'" 602 F.2d at 699 (citations omitted). Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of officer Slezak's testimony, the chief investigator of the Sorrell murders, the statements of Dr. Presswalla, and the graphic evidence which accompanied these witnesses' testimony. Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney planned to violate his direct promise to only introduce certain "statements" allegedly made by Coleman Gray

to other inmates.

The consequences of this surprise could not have been more devastating. The prosecutor's tactics prevented Gray's attorneys from preparing questions for these witnesses prior to the sentencing, and from uncovering bias or from investigating the validity of the witnesses' planned testimony in order to gather information which could be used to impeach. See, e.g., Profitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983). The Petitioner's lawyers were unable to observe and study the documents, photographs, and other forensic evidence which was submitted by the Commonwealth, in order that objections could be made, or information helpful to the defense could be drawn from these materials. Mr. Moore and Mr. Eason also could not review the evidence collected by Chesapeake's police department which strongly suggested that Timothy Sorrell actually committed the notorious murders. Finally, the defense attorneys could not adequately object to evidence presented, could not research the applicable law, and these attorneys had no opportunity to develop factual relevance objections and/or constitutional objections to the testimony introduced by the Commonwealth.

Thus, in this case, the Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed

upon Gray cannot stand.

In addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed the Petitioner's right to be sentenced based upon constitutionally reliable evidence. United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948); Richardson v. Johnson, 864 F.2d 1536 (11th Cir. 1989). As the Gholson court noted, the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or materiality of the information necessarily reduces the reliability of the evidenced presented. 674 F.2d at 738 (citing Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977)).

The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. The murders were the most highly publicized crimes in history of this local, and the primary connection between Coleman Gray and the Sorrell slayings was the testimony of Melvin Tucker, Gray's co-defendant. Recognizing the well established maxim that accomplice testimony is sufficient to support a conviction, the Court nevertheless views such information with caution. United States v. Manbeck, 744 F.2d 360, 392 (4th Cir. 1984); Watkins v. Commonwealth, 238 Va. 341, 385 S.E.2d 50 (1989). Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders. Because neither the defense attorneys, the court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's

witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

Although the Supreme Court has held that abridgement of fundamental constitutional rights at sentencing may be justified in some instances where the state demonstrates a compelling interest, the Commonwealth has not offered any justification for its unreliable procedure in this case. See Gardner, 430 U.S. at 358-61, 97 S. Ct. at 1205-06. Instead, the Commonwealth has insisted that it had no duty to give any notice to Coleman Gray that evidence he committed the Sorrell murders was to be introduced. For the reasons stated above, the Court disagrees, and finds that Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The presence of these constitutional violations leads to the undeniable conclusion that Coleman Gray's sentencing hearing was fundamentally and irreparably unfair. Because the jury was presented with and considered the unreliable Sorrell murder evidence, Gray's death sentence is constitutionally defective and cannot be upheld. Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986).

III.

For the reasons set forth above, the Court finds that petitioner Coleman Wayne Gray was deprived of his right to due process guaranteed by the Fourteenth Amendment of the United States

Constitution. The Commonwealth failed to give fair notice of its intention to prove, at the penalty phase of the McClelland trial, that Gray committed two distinct murders with which he had not been arrested for, charged or convicted. Absent the surprise introduction of the Sorrell murder evidence, there is a substantial probability that the result of Gray's sentencing would have been different. Accordingly, the Court will GRANT Coleman Gray a writ of habeas corpus, VACATE the Petitioner's death sentence, and REMAND the cause to the Circuit Court of the City of Suffolk in order that the Petitioner can be resentenced.

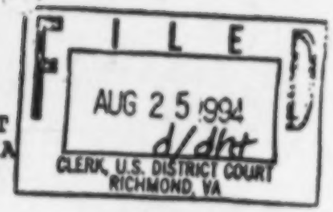
An appropriate Final Order shall issue.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: AUG 25 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION



COLEMAN WAYNE GRAY,

Petitioner,

v.

CHARLES E. THOMPSON,

Respondent.

Civil Action No. 3:91CV693

FINAL ORDER

THIS MATTER is before the Court on petitioner Coleman Wayne Gray's application for habeas corpus relief, pursuant to 28 U.S.C. § 2254. Mr. Gray challenges his December 5, 1985 conviction and subsequent sentencing by the Circuit Court of the City of Suffolk, Virginia, for capital murder.

For the reasons stated in the accompanying Memorandum Opinion, the Court hereby ADJUDGES and ORDERS that Mr. Gray's petition for habeas corpus relief is hereby GRANTED in the following respect:

The sentence of death imposed on January 27, 1986 by the Circuit Court of the City of Suffolk, Virginia, in accordance with the December 6, 1985 verdict of that Court, is declared NULL and VOID. The Commonwealth of Virginia shall, within one hundred and eighty (180) days of this date, provide the Petitioner with a sentencing hearing pursuant to the Procedures set forth in Va. Code Ann. 19.2-264.3 and any other applicable statute.

Unless an appeal from this Final Order is taken to the United States Court of Appeals for the Fourth Circuit within thirty (30)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 25, 1995

No. 94-4009
CA-91-693-R

COLEMAN WAYNE GRAY

Petitioner - Appellee

v.

CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center

Respondent - Appellant

No. 94-4011
CA-91-693-R

COLEMAN WAYNE GRAY

Petitioner - Appellant

v.

CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

APPENDIX C

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

APPENDIX D

this investigation. I respectfully request permission for him to sit at counsel table.

THE COURT: No problem.

MR. McLEES: Secondly, may I ask the Court, what is the status of our second motion for summary judgment?

THE COURT: It has not been granted. Really, you all have been, I guess, kind of fighting about the parameters of what the hearing is all about, and I would just simply explain to you in these terms. The way I look at this, the primary problem that I am concerned about and that I am going to look at closely is the notice that was given, the opportunity for cross-examination regarding the Sorrell murder issues, and this is not so much about determining whether or not Mr. Gray was responsible for the Sorrell murders. If the prosecution had exculpatory information that went in another direction and was not turned over, that impacts on any due process violation that would flow from the insufficient notice. So that kind of information would be helpful. As I say, we are not trying the Sorrell murders. I want everybody to understand that clearly.

Now, the issue of reliability is relevant, and I

APPENDIX E

think in some of the papers there was, I think, a misunderstanding of credibility versus reliability. I am not testing whether or not when this person testified, the jury had the right to believe what he said. The question is whether or not the information, the body of information was sufficiently reliable to be allowed under the Constitution.

So I put it to you that way, so that you will understand what we are trying to hear here today. Mr. McLees, do you have anything else?

MR. McLEES: Yes, sir. The Court having said that, I ask respectfully that the record reflect my objection. The issues that Your Honor has identified here today, the question of notice given and the opportunity for cross-examination and whether there was exculpatory information that was not turned over, I think were addressed in previous pleadings, and for various reasons, we have argued that they are procedurally barred and they are meritless and they simply do not establish grounds for federal habeas corpus review.

THE COURT: I understand your arguments and your objections will be noted. Just let me say this: If in fact I were to determine that the Commonwealth had information indicating that somebody

else committed these murders, did not inform the defense of that, they never had an opportunity to challenge the information, it went forward, as far as I'm concerned, that sentencing hearing would have been constitutionally inadequate. And you all can make your objections and you can appeal until somebody agrees with you, but if that is my finding, you will lose. I will tell you that straight up. I just can't imagine a circumstance less fair. I mean, this is a person fighting for their life, and you have information that indicates that somebody else might have committed the murder, and you have information that Mr. Gray might have committed the murder, fine. If you tell the defense lawyers about it and let it be hashed out and the jury believes that Mr. Gray committed it, fine. I would have no problem with that. But the circumstance that I have -- and I don't know that that is the situation, obviously. But I'm just telling you, that to me would just be terribly unfair, constitutionally unfair.

MR. McLEES: I understand Your Honor's position. If I may express one other brief objection. That is, in a procedural vein, about ten months ago when Your Honor first ordered this

hearing, we expressed to counsel and then to the Court in various ways on the telephone and in letters and in pleadings our belief that there was a need for clarification of the issues that would be addressed at this hearing. And the only response we got from all of that was ultimately in Your Honor's order denying our first motion for summary judgment, we understood the issue to be honed in the Court's words to the reliability in fact of relevant testimony for the Sorrell murders evidence. And the other issues that were BRADY claims and the other peripheral procedural issues have been eliminated in the Court's April 1st order of last year. We have prepared a case. Our evidence that we prepared tomorrow is primarily focused on establishing that Mr. Gray did in fact commit the Sorrell murders, and therefore, Mr. Tucker's testimony was reliable and it was true. And to be told on the morning of the hearing that the issue is something else than what we have understood for almost a year and what the Court identified in its order, I think, doesn't give us fair notice. I respectfully object.

THE COURT: Now, Mr. McLees, I will certainly do this. If you feel like you don't have sufficient notice of what the hearing is really abo

to him coming to the house. The point about the jeans, she indicated to me that the jeans were soaked from the knees down. They were wet. They were soaking wet.

She went on to tell me about Slezak. They were very close, to the point that Detective Slezak may have even encountered some kind of flack or grief from his department because they exchanged information on a daily basis.

Other points, she indicated that there were bullet fragments found in the rear of the automobile.

Q Did Mrs. Nixon indicate that she had learned anything from Detective Slezak concerning the crime; that he had provided her with any information that he had concerning the Sorrell murders?

A He had provided them with information concerning there was some form of paint maybe used, that a money order had been purchased. He advised them of the stop at Wendy's because of, I guess, Certificate of Analysis. Give me a moment to remember.

Q Was anything said concerning the United States Navy, any installation?

A Yes, there were a lot of conversations concerning Timothy's employment. It seems their son,

Cary Nixon, had assisted Timothy in getting employment with the Naval Exchange. In less than six months, Timothy had become a supervisor of the Naval Exchange. During that time period, a major theft ring existed at the exchange. It seemed like Timothy was a participant or associated with the participan in this ring.

Lisa had become disturbed because there was a visit a week prior to her death from a gentleman either possessing stolen merchandise or in conversation with Timothy concerning stolen merchandise. Lisa had brought this to the attention of her mother, and shortly after the death of Lisa, the Nixons provided this information to Detective Slezak. From what they had indicated to me, Detective Slezak, Chesapeake Police Department, had confiscated this merchandise from an uncle of Timothy Sorrell's.

Q Was there any information that Ms. -- strike that. Did Mrs. Nixon ever indicate to you that either she to Detective Slezak, she or her husband, or Detective Slezak to her ever suggested who might be responsible for the Sorrell murders?

A Yes. They felt Timothy Sorrell was responsible for the murder, very strongly, from his actions

coming in the door the night of the fifth crying, throughout various points of nervousness and not carrying on his normal activities. It seems from that point, he and his brother began to associate very closely, always going places together.

Q Did Mr. and Mrs. Nixon ever mention to you that they had discussed with Detective Slezak anything to do with drugs?

A I can't recall anything to do with drugs from a conversation with the Nixons.

Q Is there anything else with respect to the evening of December 5th, 1985 -- excuse me, 1984, that you can recall as to Timothy's activities that evening, the Nixons said that they discussed with Detective Slezak?

A Another point that was raised, Timothy had basically, or he was under the pretense that he was at school on that evening. Detective Slezak had verified that he was not at school on that evening, but that he was at a female friend's home when he made the phone call, the 7 o'clock, 7:30 phone call.

Q Did you talk with Detective Slezak about this case?

A Yes. We had a brief interview with Detective Slezak at the Chesapeake Police Department.

THE DEFENDANTS further affirmatively allege that:

4. Timothy Sorrell is the husband of Lisa Sorrell and beneficiary under a life insurance policy issued by Prudential Insurance Company of America insuring the life of Lisa Sorrell (Policy No. RS-014-697).

5. Timothy Sorrell is not entitled to receive the proceeds of the insurance policy bacause on information and belief, he caused the death of Lisa Sorrell and is currently under investigation by the Chesapeake Police Department.

6. It is anticipated that an indictment will be issued for Timothy Sorrell for the murder of Lisa Sorrell in the very near future and that Timothy Sorrell will be convicted of the murder of Lisa Sorrell.

7. Brenda Nixon was instrumental in the procurement of the life insurance policy in that she contacted Prudential Insurance Company in October of 1984, arranged the initial meeting between Lisa Sorrell and the insurance agent, and finally, paid the initial premium on the policy.

8. According to Virginia law, Timothy Sorrell is barred from any participation in the proceeds of the insurance policy because of his participation in the death of Lisa Sorell.

WHEREFORE, the Nixons' ask for the following relief:

1. An order barring Timothy Sorrell from receiving any of the proceeds from the insurance policy on the life of Lisa Sorrell.

LAW OFFICES
SACKS & SACKS
NORFOLK VIRGINIA

12

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA — Complainant

vs.

COLEMAN WAYNE GRAY — Defendant

MOTION

I. The accused, Coleman Wayne Gray, by counsel, hereby moves the court, pursuant to Rule 3A:11 of the Rules of the Supreme Court of Virginia, to direct that the Commonwealth's Attorney for the City of Suffolk, Virginia permit the inspection and copying of the following:

a. Any and all written or recorded statements or confessions made by the accused, or copies thereof, and any and all tape recordings made of said statements or confessions, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, that are known by the Commonwealth's Attorney to be in the possession, custody, or control of the Commonwealth, whether such statements and/or confessions be inculpatory or exculpatory.

b. Any and all real and physical objects which are relevant to the charges of:

1. possession of marijuana;
2. possession of a controlled drug, to-wit: marijuana, with the intent to distribute;
3. robbery;
4. abduction;
5. arson;
6. capital murder;
7. three charges of use of a firearm while committing or attempting to commit murder, robbery and abduction;
8. possession of cocaine;

brought against the accused for alleged acts on or about May 3, 1985; the identity of the perpetrator of these crimes; and the investigation

Petitioner's Exhibit Number 11 3:91CV693

of these crimes, any of which evidence would be exculpatory in regards to the accused and/or which would be material and necessary for the preparation of the defense of the accused, and which is known by the Commonwealth's Attorney to be within the possession, custody or control of the Commonwealth, including, but not limited to, any real and physical objects found at the scenes of the alleged crimes which would be exculpatory in regard to the accused and/or be inculpatory as to other individuals, whether or not such individuals are charged with said alleged acts.

c. Any and all reports of autopsies, ballistic tests, fingerprint analysis, handwriting analysis, hair, blood, urine and breath tests, psychiatric reports of the accused, or other scientific reports, and any and all police and investigative reports and records, which is known by the Commonwealth's Attorney to be within the possession, custody or control of the Commonwealth, and which said reports were made in connection with the charges against the accused, Melvin G. Tucker, and/or Melinda B. Gray, or others.

d. Any and all statements or confessions made by Melvin G. Tucker, Melinda B. Gray, or any other suspect or individual, which statements or confessions may be exculpatory in regard to the accused and/or which would be material and necessary for the preparation of the defense of the accused, including, but not limited to, said statements which would show inconsistencies in said statements and tend to effect the credibility of said statements or the testimony of said individuals.

e. Any and all real or physical objects or substances within the categories described by paragraphs a., b., c., or d., which hereafter come into possession, custody or control of, or become known to the Commonwealth's Attorney, or to the Police Department of the City of Suffolk, Virginia.

II. The accused further moves this Honorable Court pursuant to said Rule For an Order directing the Commonwealth's Attorney for the City of Suffolk, Virginia to file a written bill of particulars particularizing the following:

a. Whether the Commmonwealth is proceeding against the defendant as a principal in the first or second degree in the capital

murder charge pending against the defendant under Virginia Code Section 18.2-31;

b. Any and all promises or agreements made to Melvin G. Tucker or Melinda B. Gray, which promises or agreements result in the said Tucker and/or Gray testifying against the accused at trial;

c. The name and address of the informant referred to in a search warrant applied for by Carl Lilley on May 5, 1983 at 2250 hours to search the apartment of the accused.

COLEMAN WAYNE GRAY

By: James A. Moore
Counsel

Carl E. Eason
Counsel

James A. Moore
Moore & Saunders
705 W. Washington Street
Suffolk, Virginia 23434
Counsel for Defendant

Carl E. Eason, Jr.
Pretlow, Eason & Pretlow
P. O. Box 1037
104 Western Avenue
Suffolk, Virginia 23434
Counsel for Defendant

CERTIFICATE OF MAILING

We hereby certify that a true copy of the foregoing Motion was mailed this 22nd day of October, 1985 to C. Phillips Ferguson, Commonwealth's Attorney, P. O. Box 1811, Suffolk, Virginia 23434.

James A. Moore

Carl E. Eason, Jr.

pac6

FILED THIS THE 22 day of October 1985 000792

Teste: HENRY C. MUNDEN, CLERK
By: Cheryl O. Conner D.C 10:20 A.M. 41-D

VIRGINIA:

IN THE GENERAL DISTRICT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA — Plaintiff

vs.

COLEMAN WAYNE GRAY — Defendant

MOTION

COMES NOW the defendant, Coleman Wayne Gray, by counsel, James A. Moore and Carl E. Eason, Jr., and moves this Honorable Court for the appropriation of funds to the defendant for the employment of an independent investigator to assist in the preparation of the defense of Coleman Wayne Gray in the charges pending against him, or in the alternative, the defendant moves for the appointment by this Honorable Court of an independent investigator to assist the defendant in his preparation of his defense in the charges pending against him, said investigatory assistance deemed necessary for an effective and complete defense.

COLEMAN WAYNE GRAY

By: James A. Moore
Counsel

Carl E. Eason
Counsel

James A. Moore
Moore & Saunders
P. O. Box 948
Suffolk, Virginia 23434

Carl E. Eason, Jr.
Pretlow, Eason & Pretlow
P. O. Box 1037
Suffolk, Virginia 23434

Appeal Noted 8-7-85

Motion denied
5/7/87
Tim. M. Kelly

Petitioner's Exhibit Number 13 3:91CV693

000758 17

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing document was mailed this 27th day of June, 1985 to C. Phillips Ferguson, Commonwealth's Attorney, P. O. Box 1811, Suffolk, Virginia 23434.

Carl E. Eason, Jr.

disc. pac/85-165/CEE

PRETLOW EASON & PRETLOW
ATTORNEYS AND COUNSELLORS AT LAW
COLONIAL BUILDING
SUFFOLK VIRGINIA

000799

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

COMMONWEALTH OF VIRGINIA — Plaintiff

vs.

COLEMAN WAYNE GRAY — Defendant

M O T I O N

COMES NOW THE defendant, Coleman Wayne Gray, by court-appointed counsel, James A. Moore and Carl E. Eason, Jr., and moves this Honorable Court for the appropriation of funds to the defendant for the employment of an independent investigator to assist in the preparation of the defense of Coleman Wayne Gray in the charges pending against him, or in the alternative, the defendant moves for the appointment by this Honorable Court of an independent investigator to assist the defendant in his preparation of his defense in the charges pending against him, said investigatory assistance deemed necessary for an effective and complete defense, pursuant to Virginia Code Section 19.2-163.

The defendant further moves this Court for the appropriation of funds to the defendant to secure certain and particular statistical reports and surveys which the defendant deems necessary for an effective and complete defense to the charges pending against him pursuant to Virginia Code Section 19.2-163.

COLEMAN WAYNE GRAY

BY: James A. Moore
Counsel

Counsel

James A. Moore
Moore & Saunders
P. O. Box 948
Suffolk, Virginia 23434

PRETLOW EASON & PRETLOW
ATTORNEYS AND COUNSELLORS AT LAW
COLONIAL BUILDING
SUFFOLK VIRGINIA

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Petitioner's Exhibit Number 14 3:91CV693

caliber gunshot wounds to the head had caused McClelland's death. Coleman Gray and Melvin Tucker were arrested and indicted for the capital murder of Richard McClelland. Judge Godwin, the senior Circuit Court Judge of Suffolk County, appointed Mr. James Moore and Mr. Ward Eason to represent the Petitioner.

Prior to the commencement of the Defendants' trial, Gray's attorneys moved for the appointment of an investigator to help them fully and adequately prepare the Petitioner's defense. These motions were denied by the general district court and by the circuit court. See Pet. Ex. 13 & 14. In November, 1985 Gray also filed a pre-trial discovery motion, which sought the disclosure of all exculpatory evidence. See Pet. Ex. 12. Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murders.[2] Tr. of 4/21/94 at 76-77.

Perhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. Id. at 73. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder.

Before the trial commenced, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. See Pet. Ex. 8. In exchange for Tucker's testimony against his co-defendant, the Commonwealth agreed to try Gray on a capital murder charge, and to

[2] None of the Sorrell murder evidence was available for examination.

000037

prosecute Tucker only for first-degree murder.[3]

On December 2, 1985, the trial of Gray and Tucker began. This proceeding was Commonwealth's Attorney Ferguson's first capital murder trial. Tr. of 4/21/94 at 206. At the outset of the proceeding, Mr. Moore, one of Gray's attorneys, asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced at the penalty phase if defendant Gray was found guilty. Jt. App. Vol. 1 at 278. Moore based his request on Peterson v. Commonwealth, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), which established that the fair and preferred practice in capital murder trials is for the Commonwealth's Attorney to reveal the evidence to be presented at the penalty phase prior to the trial. Mr. Ferguson stated he intended to introduce evidence of statements Coleman Gray had made about other crimes he had committed. Jt. App. Vol. 1 at 279. The following conversation transpired:

> Mr. Moore: Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument. . . If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal

[3] Philip Ferguson testified at the April 21, 1994 hearing that he didn't believe Melvin Tucker ever had been charged with capital murder. Tr. of 4/21/94 at 243. However, petitioner's Exhibit 8 clearly demonstrates that Tucker was arrested and originally faced a capital murder charge. Id. at 248.

000038

purposes. It's absolute dynamite.

Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record. . . The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.

The Court: Who is the other murder that we're taking about?

Mr. Ferguson: A murder in California.

The Court: Any name?

Mr. Ferguson: Don't have a name, but a statement that the defendant made that he had committed that murder. . .The evidence is that we are going to introduce evidence to show that your client has been involved in other murders, including the Sorrell murders and including a murder in California as well as potentially other crimes.

Mr. Moore: Is it going to be evidence or just his statement?

Mr. Ferguson: Statements that your client made.

Mr. Moore: Nothing other than statements?

Mr. Ferguson: To other people, that's correct. Statements made by your client that he did these things.

Id. at 279-82.

Mr. Ferguson did not disclose to whom Coleman Gray allegedly had made statements or the context of the statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area. Tr. of 4/21/94 at 46, 92, 96. In December, 1984 Lisa Sorrell and three-year old Shanta Sorrell were abducted from Greenbrier Mall in Chesapeake, Virginia. Five days later, Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. Id. at 97. She had been shot in the head six times by a .32 caliber

000939

firearm. Shanta, who apparently died of carbon monoxide inhalation, was found in the trunk of her mother's car.

On December 5, 1985 after all of the evidence concerning the McClelland murder had been presented, and the instructions had been given, the jury retired. That same day, the jury found Coleman Gray guilty on all counts. Defendant Gray's punishment on the robbery charge and the abduction charge were each set at life imprisonment. Gray's punishment on the arson charge was ten (10) years, and he was given four (4) years on each of the firearm charges.

On December 6, the separate penalty trial mandated in capital murder cases began. See Va. Code Ann. § 19.2-264.4 (Michie 1990 & Supp. 1994). The attorneys met in Judge Godwin's chambers that morning. Mr. Moore informed the court that the previous evening, Philip Ferguson had disclosed for the first time that he intended to introduce evidence about the Sorrell murders, other than statements allegedly made by Gray to fellow inmates. Jt. App. Vol. II at 996-1001; Tr. of 4/21/94 at 83. Despite the Commonwealth Attorney's previous unequivocal pledge that the only evidence to be introduced was certain statements made by Gray, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims;[4] and 3) the medical examiner who investigated the

[4] Officer Slezak testified that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. Tr. of 4/21/94 at 120.

000940

cause of death and the nature and extent of the Sorrell's injuries.

Gray's attorneys informed the Court they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut certain statements allegedly made by Gray to fellow inmates. Tr. of 4/21/94 at 44-45. Despite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders. Jt. App. Vol. II at 996-1001, 1051-56.

The Commonwealth called Melvin Tucker to testify. Tucker was Gray's accomplice, and a man who had escaped prosecution for capital murder in exchange for his testimony. In May, 1985 while Tucker and Gray were looking for newspaper articles which discussed the McClelland murder, Gray allegedly pointed to an article with a picture of the Sorrells. The Petitioner then admitted that he had "knocked off" Lisa Sorrell. Id. at 774-75. The Sorrell murders had occurred on December 4, 1984, nearly six months earlier. No such newspaper article ever has been introduced into evidence.

Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders. The Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders, to testify. Officer Slezak presented evidence that the murders had actually occurred, by identifying various graphic photographs of the automobile and the victims. These photographs were admitted into evidence. Id. at 1056-78; See Pet. Ex. 10 (Tr. Ex. 45-56).

Officer Slezak failed to tell the jury that Timothy Sorrell,

000941

the victim's husband, was the primary and only suspect in the case for a substantial period of time. Tr. of 4/21/94 at 45. At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall on the evening of the murders, ignored the Nixons when they saw him at the Greenbrier Mall, made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. Id. at 101-03, 116. The police also designated Timothy Sorrel as their sole suspect on the evidence they sent to labs to be analyzed. See Pet. Ex. 3A-G (Certificates of analysis).

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. Id. at 112, 114-15.

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. Id. at 302, 309. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. See Pet. Ex. 1-2; Tr. of 4/21/94 at 315-16, 421.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week

000942

prior to Lisa's death, a man possessing stolen merchandise came to the Sorrell's home. Tr. of 4/21/94 at 281. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. Id. at 422. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell. Id. at 117-18.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. Tr. of 4/21/94 at 53. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." Id. at 218, 238. Such an assertion is patently absurd.[5]

Finally, Dr. Presswalla, the state medical examiner who performed the victims' autopsies, testified as to the victims' cause of death. Jt. App. Vol. II at 1069-77. The doctor's statements demonstrated that the Sorrell murders were accomplished

[5] On the date of the Sorrell murders, Melinda Gray, the Petitioner's wife, had a dinner break from Murphy's Mart from 4:29 to 5:30. In order to determine whether Coleman Gray could pick up his wife, drive to the Greenbrier Mall, commit the crime, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the Mall and Murphy's Mart. At 3:00 p.m., it took Slezak approximately twenty-three minutes to travel one way between the locations. Investigator Alfred Brown drove this same route between 4:00 p.m. and 6:00 p.m., the time the murders were committed, and it took him over forty-three minutes. Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated. Tr. of 4/21/94 at 409.

000943

in a manner strikingly similar to the style of the McClelland murder.

Gray's attorneys were not able to effectively cross-examine any of the witnesses who testified concerning the Sorrell murders. Tr. of 4/21/94 at 66-67, 86-87; Jt. App. Vol. II at 1066-69, 1077. The only Sorrell murder evidence which they were prepared to challenge was the evidence Philip Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders.

Petitioner Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, the Petitioner denied being the triggerman, and blamed the killing on his accomplice. Jt. App. Vol. III at 1137-38. Gray flatly denied any involvement in the Sorrell murders.[6] Id. at 1138. Gray also called seven witnesses who presented mitigating testimony on his behalf.

After the admission of all of the penalty phase evidence, the jury again retired to deliberate. The jurors unanimously fixed Gray's punishment at death. Following the sentencing hearing, on January 27, 1986 Judge Godwin sentenced Mr. Gray to death. Coleman

[6] In July of 1985, officer Slezak interviewed Coleman Gray. Slezak lied to the Petitioner, and told him that Timothy Sorrell was about going to be tried for the Sorrell murders. The officer asked for Gray's assistance because he claimed there was evidence which would implicate Gray in the murder, and he needed Gray to provide an explanation.

Gray denied any involvement and, without being under any compulsion to cooperate, agreed to provide fingerprint samples.

Slezak then lied again to Mr. Gray, and told him that one of his fingerprints matched a sample taken from the Sorrell murder scene. Mr. Gray's insistence that he did not commit the crime did not waiver.

000944

Gray's execution was set for April 28, 1986.

To date, no one ever has been charged with or tried for the Sorrell murders. Tr. of 4/21/94 at 200.

II.

The Supreme Court has recognized many times that the death penalty is a qualitatively different form of punishment than any other that can be imposed. Gregg v. Georgia, 428 U.S. 153, 185, 96 S. Ct. 2909, 2931 (1976); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976); Hutchins v. Garrison, 724 F.2d 1425, 1429 (4th Cir. 1983). The state's act of taking the life of a citizen differs dramatically from any other legitimate state conduct. Precisely because of the terminal nature of this penalty, this Court and every other federal and state court must be exceedingly careful to insure that prior to imposing a sentence of death, every individual receives the full force of the protections and safeguards guaranteed by the United States Constitution. Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597 (1991); Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114 (1987); California v. Brown, 475 U.S. 1301, 1304, 106 S. Ct. 1367, 1368 (1986); Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) (holding that if a person is to be executed, it should be as a result of a decision based upon reason and reliable evidence).

Petitioner Gray argues that he was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his

penalty phase. Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

The Court is compelled to agree with petitioner Gray. It is established beyond question that the penalty phase of capital trial must comport with Due Process Clause of Fourteenth Amendment. See Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204-05 (1977); Witherspoon v. Illinois, 391 U.S. 510, 521-23, 88 S. Ct. 1770 (1968); United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Therefore, the defendant has a legitimate interest in the character of his sentencing proceeding, even if he has no right to object to the result of the hearing. Presnell v. Georgia, 439 U.S. 14, 16, 99 S. Ct. 235, 236 (1978); Gardner, 430 U.S. at 359.

Specifically, the Due Process Clause does not allow the execution of a person "on the basis of information which he ha[s] no opportunity to deny or explain." Simmons v. South Carolina, 114 S. Ct. 2187, 2192 (1994) (citing Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948); Balwin v. Hale, 68 U.S. 223, 233, 17 L.Ed. 531 (1863). Therefore, although in an ordinary case a defendant could be sentenced based upon information which was not disclosed to the defendant or his attorneys, Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949), the Supreme Court has recognized that such a procedure is not acceptable in death penalty cases. Gardner v.

Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977); Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979).

The constitutional defect in Gray's penalty phase hearing - that is Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla - violated Gray's right to fair notice and rendered the hearing clearly unreliable. The essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing. When a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. See, e.g., Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723 (1991) (holding petitioner's lack of adequate notice created an impermissible risk that the adversary process may have malfunctioned).

As the Fifth Circuit Court of Appeals explained in Smith v. Estelle, Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that debate between adversaries [which] often is essential to the truth-seeking function of trials.'" 602 F.2d at 699 (citations omitted). Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of officer Slezak's testimony, the chief investigator of the Sorrell murders, the statements of Dr. Presswalla, and the graphic evidence which accompanied these witnesses' testimony. Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney planned to violate his direct promise to only introduce certain "statements" allegedly made by Coleman Gray

000947

to other inmates.

The consequences of this surprise could not have been more devastating. The prosecutor's tactics prevented Gray's attorneys from preparing questions for these witnesses prior to the sentencing, and from uncovering bias or from investigating the validity of the witnesses' planned testimony in order to gather information which could be used to impeach. See, e.g., Profitt v. Wainwright, 685 F.2d 1227, 1254 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983). The Petitioner's lawyers were unable to observe and study the documents, photographs, and other forensic evidence which was submitted by the Commonwealth, in order that objections could be made, or information helpful to the defense could be drawn from these materials. Mr. Moore and Mr. Eason also could not review the evidence collected by Chesapeake's police department which strongly suggested that Timothy Sorrell actually committed the notorious murders. Finally, the defense attorneys could not adequately object to evidence presented, could not research the applicable law, and these attorneys had no opportunity to develop factual relevance objections and/or constitutional objections to the testimony introduced by the Commonwealth.

Thus, in this case, the Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed

000948

upon Gray cannot stand.

In addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed the Petitioner's right to be sentenced based upon constitutionally reliable evidence. United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); Townsend v. Burke, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948); Richardson v. Johnson, 864 F.2d 1536 (11th Cir. 1989). As the Gholson court noted, the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or materiality of the information necessarily reduces the reliability of the evidenced presented. 674 F.2d at 738 (citing Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977)).

The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. The murders were the most highly publicized crimes in history of this local, and the primary connection between Coleman Gray and the Sorrell slayings was the testimony of Melvin Tucker, Gray's co-defendant. Recognizing the well established maxim that accomplice testimony is sufficient to support a conviction, the Court nevertheless views such information with caution. United States v. Manbeck, 744 F.2d 360, 392 (4th Cir. 1984); Watkins v. Commonwealth, 238 Va. 341, 385 S.E.2d 50 (1989). Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders. Because neither the defense attorneys, the court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's

witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

Although the Supreme Court has held that abridgement of fundamental constitutional rights at sentencing may be justified in some instances where the state demonstrates a compelling interest, the Commonwealth has not offered any justification for its unreliable procedure in this case. See Gardner, 430 U.S. at 358-61, 97 S. Ct. at 1205-06. Instead, the Commonwealth has insisted that it had no duty to give any notice to Coleman Gray that evidence he committed the Sorrell murders was to be introduced. For the reasons stated above, the Court disagrees, and finds that Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The presence of these constitutional violations leads to the undeniable conclusion that Coleman Gray's sentencing hearing was fundamentally and irreparably unfair. Because the jury was presented with and considered the unreliable Sorrell murder evidence, Gray's death sentence is constitutionally defective and cannot be upheld. Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986).

III.

For the reasons set forth above, the Court finds that petitioner Coleman Wayne Gray was deprived of his right to due process guaranteed by the Fourteenth Amendment of the United States

REQUEST FOR APPOINTMENT OF A LAWYER

VA. CODE ANN. §§ 16.1-266, 267, 19.2-159, 160, 163

File No. C85-1391

☐ Circuit Court
~~☑~~ General District Court
☐ Juvenile and Domestic Relations District Court

Suffolk CITY OR COUNTY
Coleman Wayne Gray

Adult

TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain a lawyer at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER—STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

5-23-85 (DATE) ~ Coleman W. Gray (ADULT)

The Court was advised that ....., a lawyer, has been retained to represent the accused in this Court. This information was provided by:

☐ the above-named person ☐ the lawyer ☐ .....

DATE ..... (JUDGE) (CLERK)

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence, I find that

☐ the Adult is not indigent and not entitled to representation by a court-appointed attorney.

☐ the Adult is indigent within the guideline formula set forth in the law and is entitled to representation by court-appointed counsel;

☐ the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel:

.....

.....

.....

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

5-31-85 (NEXT HEARING DATE AND TIME)

James A. Moore
134 N. Main St
Suffolk, Va

May 23, 1985 (DATE)

Charles B. Garnett (JUDGE)

File No. 15

REQUEST FOR APPOINTMENT OF A LAWYER

000078

REQUEST FOR APPOINTMENT OF A LAWYER

VA. CODE ANN. §§ 16.1-266, 267, 19.2-159, 160, 163

File No. C85-

☐ Circuit Court
~~☑~~ General District Court
☐ Juvenile and Domestic Relations District Court

Suffolk CITY OR COUNTY
Coleman Wayne Gray

TO THE ADULT: You have been charged with an offense punishable by death or confinement in the penitentiary or in jail or are involved in a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this charge. You may retain at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer for you, you shall be required to pay the statutory fee of that lawyer if you are convicted. You may also waive your right to a lawyer.

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I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the trial of the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

5-31-85 (DATE) ~ Coleman Gray (ADULT)

The Court was advised that ..... to represent the accused in this Court. This information was provided by: ....., a lawyer, has been retained

☐ the above-named person ☐ the lawyer ☐ .....

DATE ..... (JUDGE) (CLERK)

ORDER OF APPOINTMENT OF COUNSEL

The Request for Appointment of a Lawyer was executed under oath. Having examined the Adult and considered other competent evidence, I find that

☐ the Adult is not indigent and not entitled to representation by a court-appointed attorney.

☐ the Adult is indigent within the guideline formula set forth in the law and is entitled to representation by court-appointed counsel;

☐ the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel:

.....

.....

.....

Therefore, I appoint the lawyer indicated below to represent the Adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

2-10-85 (NEXT HEARING DATE AND TIME)

Carl Edward Eason, Jr.
Colonial Bldg.
Suffolk, Va.

May 31, 1985 (DATE)

Charles B. Garnett (JUDGE)

16

REQUEST FOR APPOINTMENT OF A LAWYER

File No. .....

000079

It's not so much sanity of the offense itself, it's the question of dangerousness in the future.

THE COURT: As to the first issue, of course he would not be entitled to a psychiatric examination unless there is some preliminary showing that he has some mental problem. As to the future dangerousness question, I'm going to allow it on that question. The Court will appoint a psychiatrist, and of course, it will be done prior to trial.

MR. EASON: Is the Court ready for the next motion?

THE COURT: Yes, sir.

MR. EASON: The next motion I would like to address to the Court is one simply filed as far as the document is concerned. The motion is where we are requesting appropriation of funds for the appointment of an independent investigator to assist the defendant and his attorneys in this case, and it is a two-pronged motion. Let me take up that first.

Your Honor, I am making this motion as somewhat of an analogy to Ake in the sense that some of the dicta or language used in Ake I submit is simply applicable to this motion also. First of all, if there is a question of statutory authority for the appointment of an independent investigator I submit that §19.2-163 allows for it when it says that an indigent defendant's intitled to court-appointed attorney plus other reasonable

assistance that's necessary for him, as is perhaps another analogy, a specific Federal Code section which also allows for the appointment directly of an independent investigator in criminal offenses. So, I don't think it's something of any new motion being made.

Again, Your Honor, in the Ake case, Ake v. Oklahoma, the Court said that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding it must take steps to insure that the defendant has a fair opportunity to present his defense.

The Court further stated that the basic tools of an adequate defense should be and will be allowed for any indigent defendant.

We submit to the Court that in this particular case one of these basic tools will be trying to locate, find, determine if there is any type of evidence available which, as Mr. Ferguson has characterized earlier, which may determine or assist the defendant in showing that he was not the man that killed Richard McClelland back in May.

I think it does become a question of who shot the man and there are two people at the moment who are probably going to be charged and tried on that matter.

We submit to the Court that the two defendants, the facts actually will show, knew each other before this action may have occurred and lived in the same area, the same community. We feel that, Mr. Moore and I feel as counsel for the defendant that we need assistance

in the form of an investigator, someone who has expertise in the role of going out, interviewing, discussing, talking with people in the community who may know anything about this case. The defendant's incarcerated. He can't help us. He doesn't even know the names of many, many of the people in the neighborhood. But, as the Court may well be aware, in many instances when crimes are committed there is obviously community rumors and talk about it after something occurs and in many instances accused individuals who are subsequently arrested may even discuss the matter themselves with other people in the community before they're arrested.

We submit to the Court that we need an investigator to assist us in trying to see if there are any such individuals in the community which we can locate and call as witnesses. Of course, he has two attorneys. We certainly realize that point. And the Court has bent over backwards in appointing two attorneys, I'm sure because of the severity of the case involved. But, being an attorney sometimes is a negative factor when it goes to interviewing witnesses in many senses. First of all, people don't like to talk to attorneys. Second, even if Mr. Moore or I were to perhaps be able to locate someone, get out on foot and locate some individuals and they tell us something, that we then think they are an appropriate witness for trial and then we bring them in to trial and they change their statements, or tell a different story in the courtroom, then

PAMELA H. ASKEW
COURT REPORTER
400 BUTLER AVENUE

it places us as defense counsel in a position of having to withdraw and having to testify as to prior inconsistent statements. It all boils down to a point that we do not feel as counsel for the defendant that we should be put in the position of going out and locating all the evidence. We're the ones who are supposed to be putting that evidence together and presenting it to the Court.

We believe an investigator appointed by the Court or funds allowed for that investigator would be appropriate to assist us and to assist this man. This is in our opinion a fairly complicated case, just in the sense of the number of witnesses involved and the sequence of events that are alleged to have occurred. We think that the defendant would certainly be at a disadvantage in not having some assistance in the form of potentially finding some individuals that may be of some use to the defense in presenting his defense at trial itself.

MR. MOORE: Your Honor, I perhaps would like to address just very briefly the second part of that same motion when we also ask for appropriation of funds to secure certain secular statistical reports and surveys which we deem necessary. That is, I admit, very ambiguous and I will tell the Court what I'm talking about right now.

As the Court is well aware, in the case of Turner v. Commonwealth, which is on appeal to the United

PAMELA H. ASKEW
COURT REPORTER
400 BUTLER AVENUE

States Supreme Court, I believe counsel in that case submitted some statistical reports from out-of-state surveys, out-of-state reports which showed perhaps any recial bias or prejudice which there may be when there is a black defendant charged with the murder of a white victim, vis-a-vis blacks killing blacks, or whites killing blacks or whites killing whites. And the Supreme Court of Virginia in that case said that that survey in and of itself, as the Court is well aware, that survey was not of any utility because it was an out-of-state survey or report. That certainly left open the question, we submit, as to whether the potential Virginia reports and/or surveys would be of some use in the Court making a decision upon voir dire as to the racial bias or prejudice of potential jurors.

We are asking for the ability to be able to secure reports along those lines which we would then intend to submit at the time of the voir dire in selecting the jury panel.

Your Honor, I have been in touch with a group, out-of-state group, who I have been informed by other counsel in the City of Suffolk, which potentially have those types of reports. Frankly, the man called me back yesterday while I was with the defendant over in the Hampton City Jail. I called him again this morning before I came to court and he was not in his office yet. It is my understanding that they have some of the reports that they can provide to us. I don't know

whether, frankly, there is any cost for those reports or exactly what it does entail as far as securing them. But, I'm asking the Court to allow us the ability to be able to secure those reports, to be able to submit to potentially show any racial bias once this matter does go to trial.

THE COURT: Well gentlemen, as far as the independent investigator is concerned, the Virginia Supreme Court has addressed itself to that problem and motion, of course, would be denied.

On the statistical information and reports question involved in the Turner case, the Turner case is on appeal before the Supreme Court of the United States, but it's on a question of voir dire to the jury, not on statistical information that was denied by the Court.

The Supreme Court addressed itself to that question and found no problem with it. So, I'm going to deny your motion for that. As far as the voir dire situation is concerned, we'll take that matter up at a later date on the question of voir dire.

MR. EASON: Your Honor, I have one other motion I believe that does not involve any evidence, and then we can get into the witnesses, and I will make this motion very brief, Your Honor.

This is just simply a motion to dismiss. Our position is that §18.2-31 under which the defendant is

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK
COMMONWEALTH OF VIRGINIA
VS.
COLEMAN WAYNE GRAY

MEMORANDUM

COMES NOW the Defendant, Coleman Wayne Gray, by Counsel, and submits unto this Honorable Court his Memorandum filed in conjunction with his Motion to Suppress heretofore filed, to be considered by the Court, together with testimony taken on November 7th, 1985, a copy of which transcript has been filed with this Court.

I S S U E S

I. Was the statement made by the Defendant to Detective William Freeman at 9:00 A.M. on May 22nd, 1985 and the statement made to Sergeant Carl Lilley on the same morning, made pursuant to a valid waiver of his Miranda rights, and additionally whether the statements, considering the totality of the circumstances peculiar to this individual Defendant, were made freely and voluntarily, pursuant to the Common Law Doctrine of Voluntariness.

II. Was the statement made by the Defendant to Sergeant Carl Lilley and Detective Bunker on May 23rd, 1985 made pursuant to a valid waiver of his Miranda rights, and additionally whether the statement, considering the totality of the circumstances peculiar to this individual Defendant, was made freely and volutarily, pursuant to the Common Law Doctrine of Voluntariness.

A R G U M E N T

The Defendant's statements made on May 22nd and May 23rd were both involuntary statements and therefore should be suppressed. The Court, in determining whether or not to suppress the statements, must consider each statement, and the circumstances surrounding it, separately. Therefore, this Memorandum will present arguments pertaining to the voluntariness of each, independent of the other.

This Memorandum will address each statement with a two-fold

E & SAUNDERS
...rneys at Law
...d Washington Street
...K, VIRGINIA 23434

evidence seized at the scene. The United States Supreme Court has refused to find that a defendant who confesses, after being falsely told that his co-defendant has turned state's evidence, does so involuntarily. Oregon v. Elstad, 105 Sup.Ct. at 1297; Frazier v. Cupp, 394 U.S. 731, 739 (1969). Therefore, the mere fact that Sgt. Lilley told the defendant that he had his fingerprints and that he had recovered a cigarette butt from the scene does not render his confession involuntary.

The Suffolk Police did not threaten or coerce the defendant to make any of the statements he made. They made no promises or inducements to the defendant. The defendant chose on his own to make all the statements he made to the police. He voluntarily, knowingly and intelligently made that decision. The defendant made all the statements without any impropriety on the part of the Suffolk Police Department.

Conclusion

The defendant's Motion to Suppress is without merit. Therefore, the Commonwealth respectfully requests that all the statements made by the defendant be found to be admissible and that the defendant's motion be denied.

Respectfully submitted,

Nancy G. Parr
Assistant Commonwealth's Attorney

Filed this 4th day of Nov 1985
Teste: Henry C. Burden, Clerk
By Patricia A. Gray D.C.

27

Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
E. EVERETT BAGNELL
JUDGE
P. O. BOX 1914
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
P. O. BOX 129
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Fifth Judicial Circuit

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

November 19, 1985

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Re: Commonwealth v. Coleman Wayne Gray

Gentlemen:

I have reviewed the transcript and the memoranda in the above-captioned matter on the Motion to Suppress. After considering all the facts submitted, the Court is of the opinion that the defendant, Coleman Wayne Gray, wanted to make a statement and did make a statement without any intimidation, inducements or promises. It was a voluntary statement made by him, after waiving counsel. He thoroughly understood his constitutional rights with regard to Miranda and the rights form. He had signed a rights form on a prior recent occasion, and had it explained to him again on the date of this statement.

After considering all the facts submitted, based on the law and the testimony of the witnesses, the Court finds that the statement was voluntary, and the Motion to Supress is overruled.

Yours very truly,

James C. Godwin
Judge

JCG/nsw

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Q This is the letter from myself to Mr. Sacks, Mr. Tucker. I'm going to give you a copy of it to make sure that what I'm reading is accurate, all right sir?

Mr. Tucker, this letter states as follows, the letter from me to Mr. Andrew M. Sacks, your attorney:

"Dear Mr. Sacks:

This letter is in regard to the charges currently pending against your client, Melvin G. Tucker wherein Richard McClelland was the victim. Your client is currently charged with capital murder and robbery, abduction with intent to extort money or for pecuniary benefit, arson, and three counts of use of a firearm in the commission of a felony.

This is to confirm that your client has agreed to fully cooperate with the Commonwealth of Virginia and its investigators and prosecutors and to truthfully disclose all information with respect to the involvement and activities of himself and others concerning all matters related to this case and any other crimes or offenses about which he has knowledge, whether they occurred in Suffolk or in some other location.

It is understood that your client agrees to testify fully and truthfully at any trial or court proceeding of any co-defendant or other person with respect to any matters about which he has knowledge upon request of this office or any other prosecutors in any other jurisdictions.

It is understood that your client must at all times give complete, truthful, and accurate information and testimony. Upon your client complying with the forementioned terms of this agreement this office has agreed to the following:

(1) Melvin Tucker will be tried on a charge of first degree murder rather than capital murder.

(2) A. If Melvin Tucker pleads not guilty and is convicted before the Court, a judge trial, on the charges pending against him the Commonwealth agrees to

convey to the Court the nature and extent of Melvin G. Tucker's cooperation at the time of his sentencing.

B. If Melvin G. Tucker pleads guilty to the charges against him it it agreed that he shall receive a total sentence of a term of years subject to the approval of the sentencing judge.

(3) A. Pursuant to §19.2-270 of the Code of Virginia it is agreed that any statement or testimony given by Melvin G. Tucker in any hearings or trials of any co-defendants shall not be used against him in any way other than for purjury charges should Melvin G. Tucker not be truthful.

B. It is agreed that any statements made or information furnished by Melvin G. Tucker in connection with his cooperation with the authorities in this case as set forth in this letter shall not be used against him in any way other than for purjury charges should Melvin G. Tucker not be truthful.

C. It is further agreed that this office will not provide any information received after this date from your client pursuant to his cooperation to other prosecuting offices or agencies for the purpose of criminal prosecution of Melvin G. Tucker if he complies with this agreement.

(4) Should Melvin G. Tucker wish to be tried by a jury on his pending charges the Commonwealth agrees not to oppose a motion by Melvin G. Tucker for a change of venire and agrees to leave that issue to the sound discretion of the judge of the Circuit Court.

Should it be determined that your client has deliberately given false, incomplete or misleading information or otherwise violated any provision of this agreement your client shall thereafter be subject to prosecution for any criminal violation of which this office has knowledge, including but not limited to purjury and obstruction of justice. Further, the Commonwealth shall then not be bound by the terms of this agreement.

No additional promises, agreements, or conditions have been entered into other than those set forth in this letter."

Does this fully set forth the terms and conditions under which you have agreed to testify in this case?

A Yes, sir.

Q And you understand that for this agreement to be of any force and effect whatsoever you must testify fully, completely, and truthfully regarding this case both as to your own involvement as well as the involvement of Mr. Gray? You understand that?

A Yes, sir.

MR. FERGUSON: Your Honor, I would offer this letter into evidence as a Commonwealth's exhibit in these proceedings.

THE COURT: Mr. Ferguson, you have a number of witnesses who are in the courtroom. Do you need them?

MR. FERGUSON: These witnesses have already been excused, Your Honor.

THE COURT: All right, sir.

MR. FERGUSON: I would ask that that be marked and introduced as a Commonwealth's exhibit.

MR. MURDEN, CLERK: "31".

MR. FERGUSON, Continuing-

Q Now Mr. Tucker, have you been previously convicted of any criminal offenses, felony criminal offenses?

A Yes, sir.

Q How many?

A One.

Q And what was that offense?

A Armed robbery.

Q All right. Other than that do you have any other prior convictions of felonies or crimes involving moral turpitude? I believe you have one petit larceny as a juvenile; is that correct?

A Yes, sir.

Q Other than those two offenses do you have any prior convictions of felonies or crimes involving moral turpitude?

A No, sir.

Q All right. Now Mr. Tucker, I'm going to ask you some questions relative to this case and I would ask that you speak so the members of the jury can hear you. Can all you hear, including the gentleman on the end down here?

Now Mr. Tucker, do you know the defendant in this case, Coleman Wayne Gray?

A Yes, sir.

Q And how long have you known Mr. Gray?

A Several months.

Q Allright. You mean several months prior to this particular incident involving Mr. McClelland?

A Yes, sir.

Q All right. Now Mr. Tucker, I want to take your attention back to May the 2nd, evening of May the 2nd and before that time. I want you to tell the members of the jury exactly how this situation came about and what occurred?

A I came over to the house one day, and--

Q When approximately was this that you went over, came over to Mr. Gray's house?

A I don't know what date it was, but one afternoon.

Q How far prior to, how much prior to this incident was it that you came over?

A It was inside a week, week-and-a-half.

Q Within a week-and-a-half?

A Yes, sir.

Q All right. When you came over to Mr. Gray's house what did you observe? What was happening?

A I came over for something, and he asked Linda-- he told me something about Linda had turned into a stick-up artist or something like that, and asked her to get a sketching of paper that she had drawed.

Q What kind of paper are you talking about?

A Sketching of Murphy's Mart.

Q All right. And so what happened after that? Who is Linda or Melinda?

A His wife.

Q All right. Go ahead.

A And they started discussing the areas in the store and the security at the store.

Q For what purpose?

A One purpose was to go in the store and hide until closing time.

Q And then do what?

A Then to rob the store afterwards.

Q All right. Now, as they were discussing this agreement where were you, or what they wanted to do, where were you?

A I was in their house.

Q All right. And what happened after that? Did they talk with you about the incident, about what they wanted to do?

A Yea; rob the store.

Q All right. And so what happened after that?

A After we were discussing that another day came around. We went over to his wife's--

Q Speak up.

A We went over to his wife's brother's house.

Q Okay.

A Was there getting high, and we left

that night.

Q What do you mean "getting high"?

A Free basing.

Q What does free basing mean?

A Smoking cocaine.

Q Who was smoking cocaine?

A Everybody that was in the house.

Q Well, I mean were you smoking it?

A Yes, sir.

Q Was Coleman Gray smoking it?

A Yes, sir.

Q All right. Now, when was this that you-all went over to the house?

A Inside-- It was inside that week and-a-half.

Q All right. Go ahead.

A And after we finished free basing we came back home. And I left my free base bowl over there, so he carried me back another day to get it. When I went and got it we free based a little more and came back, and that's-- As we was passing Murphy's Mart he looked over at Murphy's Mart and said, "Linda was right, the store close and everybody's out of the store at quarter to 9:00, or quarter after 9:00."

So, we pulled over and we parked. We was observing people coming up to the store. And we sat out there for a while, and then--

Q Where were you-all parked?

A In the parking lot.
Q What store were you in front of?
A I think it was Greenhood Distributors.
Q All right. Whose car were you in?
A Coleman's Gray.
Q Is that Coleman Gray's red Cutlass with the white top you're referring to?
A Yes, sir.
Q Who was driving the car?
A Coleman Gray.
Q All right. Now, as you were sitting there in the car what was your purpose for sitting there?
A I didn't really have a purpose as of then.
Q Okay. So how were you-all facing?
A We was facing Greenhood Distributor.
Q All right. I realize you were in front of Greenhood Distributors, but where was the nose of the car facing?
A Murphy's.
Q All right. And at that time, approximately what time was it that you-all were facing looking at Murphy's Mart?
A We sat there until about from 9:00 something to about 11:00 something, something after 11:00.
Q All right. Was anybody in the Murphy's

Mart store at the time that you-all were sitting there?
A Yes, sir.
Q Who was sitting in there?
A Security guard.
Q Who was in the Murphy's Mart store?
A Security guard and Mr. McClelland.
Q And how did you know that they had gone into the store?
A Well, I didn't know that they had gone into the store. We saw them walking back and forth around in the store.
Q Oh, I see. Is that when you-all turned in, when you saw them walking back and forward in the store?
A No, sir. We just pulled up and parked but we noticed a car in the parking lot.
Q Okay. All right. Now whose idea was it to pull into the parking lot in reference to the Murphy's Mart that night?
A Well, Coleman Gray pulled in. It wasn't an idea. We were just coming back and he looked over there and say, "Linda was right, everybody's out of Murphy's at quarter to 9:00, or quarter after 9:00." And he turned off and parked in the parking lot.
Q All right. How, how long did you-all sit in front of Greenhood Distributors waiting, looking at the Murphy's Mart itself?
A Maybe three hours, two hours and a

half, something like that.

Q And eventually what happened?

A Security guard and Mr. McClelland came out, left, and went to Hardee's.

Q All right. Now did they leave in the same car or separate cars?

A Separate cars.

Q And when they left what did you-all do?

A We followed them.

Q All right. And what happened when they got to Hardee's?

A The security guard went through the drive-thru. Mr. McClelland went on the inside, and we waited until he came out.

Q Where did ya'll wait while Mr. McClelland was inside the store?

A In Hardee's parking lot.

Q And where in Hardee's parking lot were you-all in reference to Mr. McClelland's car?

A eside his car, parked beside his car.

Q How close to his car? I mean, one space, directly beside it, or was it any space between you or not?

A One space away.

Q All right. Now, what kind of car was Mr. McClelland driving?

A It was a small gray car.

Q All right. Now tell us if you would what happened? Did Mr. McClelland eventually leave the Hardee's?

A Yes, sir.

Q Or come out of the store?

A Yes, sir.

Q And what happened as he was coming out of the door of Hardee's?

A He got into his car and left.

Q All right. Did you and Coleman Gray have any discussion regarding that?

A Yes, sir. When he came out, before he came out to his car we was discussing whether to get in his car or wait for him, before he got in. But, we didn't. So he got in his car and left.

Q All right. Now, after he got in his car and left what direction did he head?

A Back up towards Smithfield, going towards down 17.

Q Route 17?

A Yes, sir.

Q Was that headed towards the city limits of Suffolk?

A Yes, sir.

Q And what happened as he headed down Route 17? Where were you-all?

A We was behind him.

Q All right. And after you-all were behind him what path or route did you-all follow?

A I don't know the name of the street, but I think we went up through Driver's, through the back way of Driver's.

Q All right. And where did you eventually end up?

A I don't know the name of the place.

Q All right. Was it in an intersection area?

A Yes, sir.

Q All right. And at that particular intersection was that the intersection of Bennett's Pasture Road and Nansemond Parkway?

A Yes, sir; I think it is.

Q Now, what happened as you pulled up to that intersection? Who was in front, you-all or Mr. McClelland?

A Mr. McClelland.

Q Did he pull up to the stop sign? Did he stop?

A Yes, sir.

Q And who was driving the car you were in at that time?

A Coleman Gray.

Q And what did Coleman Gray do when Mr. McClelland stopped at that stop sign?

A Pulled across in front of him,

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blocked--

Q How did he pull in front of him?

A When he came, when he slowed down to stop he just pulled across in front of him like, blocked the car.

Q How did he go around Mr. McClelland? Did he go around the passenger's side or the driver's side?

A Around by the passenger's side.

Q All right. And then how did he park his car? Could you take your hands and show the members of the jury how he pulled around?

A This was Mr. McClelland's car here. This was Coleman Gray's. (The witness indicated with his hands.) He blocked it off in front like this here.

Q All right. Could you stand up just a second to show the members of the jury? All right, if this sheet of paper right here is Mr. McClelland's car which is stopped at the intersection-- We have a photograph of Mr. Gray's car. Would you take that car. You were behind him, right?

A Yes, sir.

Q Behind the piece of paper. Take the car behind it and I want you to show the members of the jury how he blocked him off?

A Just came in around through here like this and came across here like this here.

PAMELA H. ASKEW
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(The witness indicated with a piece of paper and a photograph.)

Q So, he pulled at an angle in front of Mr. McClelland's car?

A Yes, sir.

Q All right. Now, after he pulled in front of McClelland's car like that what did Gray then do?

A Gray got out the front of the car here, and walked around to the driver's side. And I got out the side of the car and came around to the back.

Q All right. Speak up now so the members of the jury can hear you.

A Gray got out his car, walked around to Mr. McClelland's, to the driver's side. And I got out the other side and walked around to the car.

Q You walked around to whose car?

A Mr. McClelland's car.

Q Did you get into Mr. McClelland's car?

A No, sir.

Q What did Mr. Gray do?

A Just walked—Ordered him out the car.

Q Did either one of you-all have a weapon?

A Yes, sir.

Q Who had a weapon?

A Coleman.

Q What kind of weapon did he have?

A .32 revolver.

Q All right. Was it loaded?

A Yes, sir.

Q Whose gun was it?

A Coleman's Gray gun.

Q Do you know where he got it from?

A I couldn't-- I know where he say he got it from.

Q Where did he say he got it from?

A That was Matt house, dude named Matt.

Q Matt?

A Yes, sir.

Q Matthew Drewery?

A Yes, sir.

Q All right. Now, after Mr. Gray pulled the gun on Mr. McClelland how did he hold it on him and what did he do?

MR. MOORE: Your Honor, I object to the leading testimony. There hasn't been any testimony he pulled a gun. There is testimony he had the gun.

MR. FERGUSON: I'll rephrase the question, Your Honor.

MR. FERGUSON, Continuing-

Q You have indicated Mr. Gray had the gun. What did he do with the gun as he approached Mr. McClelland's side? What did he do?

A He had the gun pointed at Mr. McClelland.

Q And what did he order Mr. McClelland to do?

A Get out the car, get into the car that we was in.

Q And did Mr. McClelland obey his orders?

A Yes, sir.

Q What did Mr. McClelland do?

A He was sitting in the car. When he first pulled up on him he was sitting in the car and he asked him to get out the car, to come get in our car. And Mr. McClelland was, I guess he was scared. He was slowly getting out and he hit him a couple of times.

Q He did what?

A Hit him a couple of times.

Q Who hit him?

A Coleman Gray.

Q Hit who?

A Mr. McClelland.

Q With what?

A With his hand.

Q With his hand? Did he hit him hard or not?

A He hit him. He hit him hard enough to let him now he meant business.

Q I see. All right. Now, where were you standing when all this was going on?

A Right beside him.

Q On the driver's side or on the passenger's side?

A On the driver's side.

Q So ya'll were right there together?

A Yes, sir.

Q All right. Now, after Gray hit him a couple of times, told him to get out, did Mr. McClelland get out?

A Yes, sir.

Q And where did he then go?

A To Coleman's Gray's car.

Q And where did he get in Mr. Gray's car?

A Around on my side, through the passenger's side. Sat in the back seat.

Q And what did you then do?

A I got in the front of the car. I got around in the passenger's side and Gray came around and got in his side.

Q What happened to Mr. McClelland's car?

A Well, Gray had pulled Mr. McClelland's car over there to the side of the road.

Q All right. And after he pulled the car over to the side of the road what did he do?

A He came back, got in his car. Came back through the intersection and came back.

Q Now, speak up Mr. Tucker so all these members of the jury can hear you. Now, after you got back in the car where were you, in the driver's seat or the passenger's seat?

A Passenger's seat.

Q Where was Coleman Gray?

A In the driver's side.

Q Where was the gun?

A The gun was up front.

Q All right. Well, where up front?

A Sitting in a little pocket up in the front of his car.

Q Well, but I mean where was it in relation-- Who had it, you or Gray?

A No one had it at that time.

Q Was it between you-all?

A Yes, sir.

Q All right. Now, at that point what happened? What did you-all-- Did you make any statements to Mr. McClelland?

A Yes, sir.

Q Tell us about what statements were

made.

A The statement that was made about what would happen if he didn't do what was told.

Q Who made those statements?

A Me and Gray.

Q So you made some threatening statements to Mr. McClelland?

A Yes, sir.

Q What threatening statements did Mr. Gray make?

A About his family. Same as I did.

Q Well, tell me what those statements are? We don't know what they are.

A We threatened him that if he didn't do as we told him we, we would do this, that, and the other to his family.

Q I want to know when you say, specifically, when you say this, that, and the other , I want to know specifically what you told him you-all would do to them if he didn't do what you told him to do, in the words that you used.

A Well, we just told him that we would do-- I don't think we said what we would do. We just mentioned his family.

Q You mentioned that you would do harm to them?

A Yes, sir. I mean, we indicated that but we didn't say what kind of harm.

Q I see. All right. Now, how did you know he had a family?

A Because saw the photos in his wallet.

Q How did you get his wallet?

A We asked for the keys.

Q Was that as soon as you got in the car?

A No, not as soon as we got in the car.

Q Well, where were you? Who asked for his wallet?

A Well, we didn't ask for his wallet. We asked for the keys. That's when he said the keys were in the wallet and he put his wallet up front.

Q When he put his wallet up front what happened?

A We went through the wallet. I went through the wallet.

Q You did it?

A Yes, sir.

Q Was anything, any money in the wallet?

A Yes, sir.

Q How much money?

A About $600 or $700.00.

Q What did you do with that money?

A Took the money out, placed it in my sock, and--

Q Did you place it in your sock

immediately at that time?

A No, sir.

Q Where did you put it as soon as you took it out of the wallet?

A The wallet was placed up there on the console, in the pocket on the console as we were going back, headed towards Bellville.

Q Is there a console in Mr. Gray's car?

A Yes, sir.

Q Now, what did you do after that? What did you do? Where was the wallet itself put?

A Up on the console.

Q All right. Now, after you got the money out-- Was there anything else in his wallet that made you know he had a family?

A Yes, sir; some photos of his, I guess it was his children.

Q All right. Is that when you-all made the threatening statement regarding his family if he didn't do what you said?

A Yes, sir.

Q All right. All right now, speak up, Mr. Tucker, so everybody can hear you. If anybody can't hear, please let me know and I'll get him to speak up.

Now Mr. Tucker, after you-all got the man's wallet where did you-all head towards?

A Toward Murphy's Mart.

Q And what was the purpose in heading towards Murphy's Mart?

A To get him to call security, go into the store.

Q All right. Now, tell me a little bit about that. What conversations did you-all have as you were heading back towards Murphy's Mart, if any, relating to the security?

A We asked him the security of the store and how would he go about turning off the alarm in the store.

Q All right. And what did he indicate to you?

A He said, he told us there was a number that he had to call to get the alarms turned off.

Q All right. Did you-all tell him what you would do to him if he didn't do it?

A I suppose we did.

Q I want to know what you told him as you were going along.

A Well, I don't think we told him anything. We was making threats about his family.

Q Who was?

A Coleman Gray and I.

Q Both of you-all, as you were going along were continuing to make threats towards his family?

A Yes, sir.

Q All right. Now Mr. Tucker, eventually did you arrive at the Murphy's Mart store?

A Yes, sir.

Q All right. And when you arrived there where did you-all park your car? Where was your car put, Gray's car?

A Over on the side, on the side road of the Murphy's Mart.

Q All right. And when you got at that point what then happened when you arrived? Why did you park the car there or why did Mr. Gray park the car there?

A So the car wouldn't be seen.

Q All right. And what was then done?

A Gray got out the car. Mr. McClelland got out the car. First we asked who was going in.

Q Who asked that?

A Well, I can't remember who. Well, I can't remember who asked the question, but we wanted to know who was going in with the man.

Q You mean a conversation between you and Gray?

A Yes, sir.

Q All right. So what happened as you-all discussed who was going in?

A Nothing happened. We just came to the conclusion. He just went in.

Q Who went in?

A Coleman Gray.
Q Would go in?
A No. He just went in.
Q All right. And who went in with him.
A Mr. McClelland.
Q Now, when Gray went in where was the gun?
A Coleman Gray carried the gun with him.
Q Why did you stay in the car? What was the purpose of that?
A Purpose of me staying in the car was to, for fear. I mean, so to make him think that if things didn't go right I was going back to his house.
Q In other words, that even if Gray got caught you would go get his family?
A Yes, sir.
Q Did you make that clear to Mr. McClelland?
A Well, I told him.
Q You told him that?
A Yes, sir.
Q All right. Now, as a result of that did Mr. McClelland cooperate with you-all?
A Yes, sir.
Q Did he ever resist you in any way whatsoever?

A No, sir.
Q Now, how long approximately-- Did Gray and Mr. McClelland eventually end up inside the store?
A Yes, sir.
Q And actually do you know how long they were in there? Approximately?
A About a half an hour; something like that.
Q All right. And eventually did they come back out to the car?
A Yes, sir.
Q And when they came out what did they have with them?
A Push cart.
Q What do you mean, a push cart?
A A shopping basket.
Q You mean one of those metal baskets like you use in a Murphy's Mart store?
A Yes, sir.
MR. MOORE: Your Honor, I object to the leading question. Mr. Ferguson doesn't have to testify.
THE COURT: Well, I don't think it makes any difference. I think everybody understands what kind of basket he had, but go ahead.
MR. FERGUSON: All right, sir.

MR. FERGUSON, Continuing-

Q So in any event, he came out with a push cart basket; is that correct?

A Yes, sir.

Q Is that one of the standard baskets like they use in the Murphy's Mart stores?

A Yes, sir.

Q All right. Now, what was in this basket?

A Three bags of money.

Q And what was done? Where were the money bags put?

A The money bags were took out of the basket and put in the back seat.

Q Who took the money bags out and put them in the back seat?

A Me, Coleman Gray, and Mr. McClelland.

Q All right. And after the money bags were put in the car-- Were they heavy? Or let me rephrase it. How many did you lift?

A I think it was about one; maybe two.

Q Were they heavy or light?

A It was sort of heavy.

Q All right. And all the bags were put in the back of the car?

A Yes, sir.

Q What happened after the bags were

001709
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put in the car?

A Mr. McClelland was told to get back into the car.

Q Did he get back in?

A Yes, sir.

Q And where was the weapon at that time?

A Coleman Gray still had the weapon.

Q All right. Now, after making McClelland get back in the car what did you do?

A Got back in the passenger's seat.

Q Where did Coleman Gray get?

A He got in the driver's side of the car.

Q All right. And after you did that did you-all leave the Murphy's Mart area?

A Yes, sir.

Q And where did you head?

A To-- We was coming out to the intersection of Hardee's. Coleman Gray pulled over to the gas station to get some gas.

Q And where did he get-- What did he put the gas in?

A He put some in the car and put some in the gas can.

Q Where was the gas can that he had?

A It was in the trunk.

Q Trunk of the car?

PAMELA H. ASKEW
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001710

A Yes, sir.
Q All right. Now, while you were over at the gas station did Mr. McClelland make any moves or try anything funny?
A No, sir.
Q All right. Had you-all made any statements to him about what would happen if he did?
A No, sir; not-- All the threats had stopped before we got to the Murphy's Mart.
Q I see. Did he cooperate with you in every way?
A Yes, sir.
Q Now, after you got the gas and put the gas in the gas can where did you go?
A To the campus of Frederick College.
Q Tidewater Community College?
A Yes, sir.
Q All right. And was that off of Route 17?
A Yes, sir.
Q And what happened as you turned off Route 17 on to College Drive? Where did you then go?
A We went straight down the road.
Q All right. And what happened then?
A We made a right up on College Drive.
Q Okay.
A And went to--

Q Where did this right take you to?
A To the area that Mr. McClelland was shot.
Q All right. And how did you pull into this area?
A We made a right.
Q Okay.
A Went in, we passed by the college. We went down, made a right and it was a road on the side. We pulled about a car length and-a-half down the road and backed in.
Q Was this the little road there where Mr. McClelland was shot?
A Yes, sir.
Q And after you turned into that little road, you then backed in?
A Uh-huh.
Q All right. And what happened after you backed into there?
A Mr. McClelland was asked to get out of the car.
Q Who asked him to get out of the car?
A Coleman Gray.
Q And what did you do when Gray asked him to get out of the car?
A I got out the car, let him out the side of the car.

Q What side did McClelland get out on?

A The passenger's side.

Q All right. And where did Mr. McClelland then go?

A Around to the back of the car.

Q And how far behind the car was he?

A About 15 or 20 feet; something like that.

Q All right. And when he got back there behind the car, as the car was sitting and McClelland went to the back of it, was the front end of the car facing towards College Drive?

A Yes, sir.

Q So you could pull straight out at that point?

A Yes, sir. We could pull-- I had to pull out but we still have to make a left to get back on the road.

Q I understand that, but I'm talking about off of the side road?

A Yes, sir.

Q All right. Now, when Mr. McClelland went back to the back what happened behind the car?

A -- He said, first thing he said was, said don't shoot him or don't hurt him or something like that.

Q Who said that?

A Mr. McClelland.

Q Who did he make that statement to, not to hurt him or shoot him?

A Coleman Gray.

Q And who had-- Did Gray have any kind of weapon at that point?

A Yes, sir. He had the pistol.

Q This .32 caliber?

A Yes, sir.

Q All right. Now, after Mr. McClelland asked him not to hurt him what did Gray do, or order Mr. McClelalnd to do?

A He told him he won't going to hurt him, said he was just going to tie him up.

Q So what did he have McClelland do?

A Had him get on the ground.

Q All right. And did Mr. McClelland get all the way on the ground?

A Yes, sir.

Q All right. And what happened after Mr. McClelland got on the ground?

A That's when I got into the car.

Q And what happened as soon as you got in the car? What did you hear?

A Some gunshots.

Q How did the gunshots go?

A Just one after another.

Q Do you know about how many were fired?

A I can't say how many were fired, but the gun was empty.

Q The gun was empty?

A Yes, sir.

Q Now, how did the gunshots go? Were they one after the other or was there some hesitation between them?

A No, sir; won't no hesitation.

Q All right. How many shots did you. hear?

A It was about, I guess it was about five shots, maybe six.

Q All right.

A It was just one shot after the other.

Q All right. Now, after you heard those shots what happened then?

A I came around and got into the car.

Q Who did?

A Coleman Gray.

Q And when he got into the car what did you say to him or what conversation did you have?

A I asked him why did he do that, and he said he had to because the man knew him. And I asked him did he see him, and he said, "Yea, he was looking in my face the whole time I was in the store."

Q All right. Now, after he told you that what then happened?

A We pulled off and started out down

the road and went towards 17, back down 17.

Q What happened to the gun?

A I don't think he was holding the gun. I guess he put it back up front.

Q All right. What happened to the shells in the gun?

A Well, he took the shells out of the gun and reloaded the gun.

Q All right. Who did he give the empty shells to?

A To me.

Q All right. And how many shells did he give you?

A I guess it was about six.

Q Allright. What did you do with these shells?

A Throwed them out the side of the window.

Q Where were you when you threw them out the side of the window?

A On the passenger's side.

Q I know that, but I mean where?

A In Coleman's Gray's car.

Q I understand that, but at what location?

A College Drive.

Q Somewhere on College Drive?

A Yes, sir.

Q Now, after Coleman reloaded the gun what did he then do with it?

A I can't remember. He put it up. I can't say where he put it at.

Q All right. Now, after he put that up where did you-all go in the car?

A Through Huntersville headed up towards Bellville.

Q Is Huntersville an area kind of behind or off to the side of College Drive? Is it kind of a short-cut?

A Yes, sir.

Q All right. And as you cut through Huntersville did you eventually come out to Route 17?

A Yes, sir.

Q Now, after you hit 17 where did you-all go then?

A Made a right on 17.

Q Where did you go to?

A To Mr. McClelland's car.

Q And when you got to the car, McClelland's car, did you-- or before you went to McClelland's car did you talk with Gray about what ya'll were going to do?

A Yes, sir.

Q What conversation did ya'll have?

A Well, I was wondering why he didn't pull straight over and go to Bellville.

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Q Is that where you and Coleman Gray lived, in Bellville?

A Yes, sir.

Q All right. Go ahead.

A And he said he was going to burn up Mr. McClelland's car because he had to burn up the evidence.

Q All right. And so after he said you were going to burn up Mr. McClelland's car to burn up the evidence did ya'll go to McClelland's car?

A Yes, sir.

Q And when you got to McClelland's car what happened?

A He took the gas can out, dashed some gas in there and I threw the wallet in the car.

Q All right. Who got the gas can out?

A Coleman Gray.

Q Where did he get it out of?

A Out of his trunk.

Q Was this the same gas can that he had filled up when ya'll had stopped to get gas?

A Yes, sir.

Q Now, where did he throw gas in the car?

A In the front, in the back.

Q All over the car?

A Yes, sir.

PAMELA H. ASKEW
COURT REPORTER

A I don't know, really.

Q You don't know?

A No, sir.

Q But wherever he was shot, ya'll left his body there?

A Yes, sir.

Q All right.

MR. FERGUSON: I have no further questions. Answer defense counsel.

MR. MOORE: Your Honor, we would like to take a short recess. We would request one.

THE COURT: All right, sir. Ladies and gentlemen, take a short recess.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND RETURNED TO THE COURTROOM FOLLOWING A BRIEF RECESS.

MR. FERGUSON: Your Honor, I have a few additional questions I would like to ask Mr. Tucker.

MR. FERGUSON, Continuing-

Q Mr. Tucker, the time this incident occurred were you employed?

A Yes, sir.

Q Where were you employed?

A Hampton Roads Sanitation Department.

Q Speak up, now.

A Hampton Roads Sanitation Department.

Q All right. Is that the Nansemond Treatment Plant?

A Yes, sir.

Q And Mr. Tucker, had you ever taken Mr. Gray to that particular location, or had he ever been over there before, to the plant site itself?

A Yes, sir.

Q Had you ever given him a tour of the plant?

A Yes, sir.

Q All right. Now in that regard, you have indicated that this was the weapon that was used in this particular incident. What happened to the gun after Mr. McClelland was killed?

A Some days later we throwed it in the contact tank.

Q Who throwed it in there?

A Coleman Gray.

Q All right. Were you with him when it was thrown in the contact tank?

A Yes, sir.

(A photograph was shown to Mr. Eason by Mr. Ferguson.)

Q Mr. Tucker, I have got a photograph I would like to show you and ask you if this photograph

depicts the Nansemond Treatment Plant where you are talking about?

A Yes, sir.

Q And what is the contact tank? Can you-- Is the contact tank depicted in that photograph?

A Yes, sir.

Q All right. And would you mark-- Have we got a pen? Would you mark an "x" at the location on which the gun was thrown?

A This contact tank here.

(The witness so marked on the photograph.)

Q Okay. I don't know whether they can see that. Okay. I think they can see the mark. Put a big "x" over that location, if you would. All right. I think they can see it.

Now, what is this contact tank? What does this do in the treatment plant? Where is this in relation to the other things in the plant itself?

A Well, that's the last spot, that's the last spot the water go before it leaves off the plant.

Q All right. Why was the gun thrown in the contact tank as opposed to any other location?

A Because it suppose to leave the contact tank and go out to the river.

Q All right. That was what you-all hoped it would; is that right?

A Yes, sir.

Q All right. Whose idea was it to

throw the gun in the contact tank?

A I guess it was his idea. He throwed it in there.

Q All right. But you were right there with him when he threw it?

A Yes, sir.

Q Were you working on the day he came over there with the gun or not?

A Yes, sir.

MR. FERGUSON: Your Honor, I would ask that this photograph be marked and introduced into evidence as a Commonwealth's exhibit in these proceedings.

MR. MURDEN, CLERK: "33".

MR. FERGUSON, Continuing-

Q Now Mr. Tucker, prior to the robbery going down had you and Mr. Gray gone to the Murphy's Mart store?

A Yes, sir.

Q Who did you go over there with?

A His wife.

Q And how long was that before the robbery went down?

A That was still inside the week, week-and-a-half.

Q Within the week?

A Yes, sir.

SYLVESTER JOYNER, having been first duly sworn, was called as a witness on behalf of the Commonwealth and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Would you state your name for the jury and for the Court?

A Sylvester Joyner.

Q And Mr. Joyner, where are you presently living?

A In the Suffolk City Jail.

Q And are you awaiting sentencing on a heroin-related charge, possession of heroin conviction?

A Yes.

Q Now Mr. Joyner, were you awaiting trial back in May, on May 10, 1985, in the Suffolk City Jail on that heroin-related charge?

A Yes, sir; I was.

Q And so we can get the record straight, Mr. Joyner, you have been previously convicted of several felonies; have you not?

A Yes.

Q Is it not true that you have been convicted of one burglary, two grand larcenies, along with your current conviction of possession of heroin?

A Yes.

Q In addition to that have you not

been convicted of either four or five petit larcenies, or crimes involving moral turpitude, unlawful concealment?

A Yes.

Q In addition to that you have been convicted of one petit larceny as a juvenile; is that correct?

A Yes, sir.

Q How old are you, Mr. Joyner?

A Thirty-two.

Q Now, I want to take your attention back to that particular time, around May 10th of 1985. Did you have occasion at that time to be in the same cell block with the defendant in this case, Coleman Gray?

A Yes.

Q All right. I believe he was brought in jail on a drug-related charge; is that correct?

A Yes.

Q Was that the purpose for which he was in jail at that time?

A Yes, he was.

Q Now, while you were in jail did you have occasion to have any conversations with Mr. Gray in reference to the murder of Richard McClelland, the manager of the Murphy's Mart store?

A Yes.

Q Tell the members of the jury, if

you would, how these conversations got started?

A Well, it was publicized on T.V. a lot.

Q Okay.

Q And Mr. Gray, you know, he was acting real funny about it. He talked to me about it.

Q Speak up, okay?

A And you know, he was asking me, you know, certain things about, you know, that case. And, you know, telling me about it and things of this nature here.

Q All right.

A And as we kept on talking, you know, he told me, said, you know, he was involved with it.

Q Who did he say was involved in this case?

A Him and Melvin Tucker.

Q All right. What else did he tell you about it?

A Well, you know, I asked him, you know, certain things, you know, about the robbery and he was telling me about it.

Q What was he telling you about the robbery?

A Well, told me how they had done it.

Q How did he tell you they had done it?

A Well, he told me, said they had

waited for the man to come out the store that night, and when he came out that's when they got him, carried him back to the store. The man was at a fast food place.

Q All right.

A And they carried him back to the store. That's when they made him go in the cash box or whatever.

Q Now, what other conversations did you have with him? After they had done the robbery, what did he tell you they did then?

A I asked him, Why did, you know, Why did they have to kill him, you know, because they had, you know, got what they wanted, you know. And he said he had to kill him because the man knew him.

Q Did he tell you who specifically had killed Mr. McClelland?

A He said he did.

Q Did he tell you how he did it?

A Yea.

Q How did he tell you he did it?

A Said they had carried him behind the school, you know, tied him up and he shot him in the head.

Q Who said he shot him in the head?

A That what Gray said.

Q Are you referring to the defendant in this case, Coleman Wayne Gray, when you say Gray?

June, you said between the 1st and 5th.

A Well, I don't know the exact date he came in jail. You know, I can't be exact about saying it's the 1st or 2nd or 3rd. I can't be exact to say which particular day he came in jail.

Q Well, we can't be exact as to when you had the conversation with him, either, and that's what I'm asking you.

A Well, I'm trying to give you the best answer that I can.

Q Well, can you give me some approximation? You're saying that it was sometime around the 1st to the 5th of June?

A Yea. It would be somewhere in that neighborhood.

Q And then you contacted Sergeant Lilley?

A Yes.

Q And you say that Coleman Wayne Gray, during one of these two conversations that you had with him, told you that he had tied up the hands of Richard McClelland?

A Yes.

Q Did he tie his feet, also?

A Well, I don't know if he tied up his feet or not. But he said he tied his hands behind his back and had stuck something in his mouth to keep from him hollering.

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Q Did you ever hear about Mr. McClelland getting his hands tied up while you were listening to the T.V. or reading the newspaper articles regarding that?

A I really can't say for sure, you know, because, you know, I really didn't pay that no mind.

Q Did you hear any of the newspaper, hear any of the T.V. stories or read the newspaper articles after you had your conversation with Coleman Wayne Gray?

A What you mean? After it had happened?

Q Yes, sir.

A Oh, yea. It was in the paper and in the news.

Q You had conversations with Mr. Gray?

A Oh, no, no. Not after he had got arrested. After he got arrested he didn't never come back to the Suffolk City Jail.

Q And you also said that Mr. Gray told you that he fired five or six shots?

A Yes.

Q He was not specific?

A No. No, he wasn't specific about it.

Q Mr. Joyner, when are you set to go to court on your sentencing for your possession of heroin?

PAMELA H. ASKEW
COURT REPORTER
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it, --

Q All right. Go ahead.

A -- the robbery. And that his wife had worked for the place there, Murphy's Mart, and the man that she had worked for had fired her, okay?

And he had mentioned the fact that it was him, his wife, and a guy named Tucker involved.

Q All right.

A And he had also said where he had placed the body.

Q Where did he say that was?

A Only thing I could recollect was in a field.

Q All right.

A And he also stated that he killed this man.

Q He indicated that he himself had shot and killed the man?

MR. EASON: Your Honor, I object to the leading question.

MR. FERGUSON: I'll rephrase the question.

MR. FERGUSON, Continuing-

Q Did he indicate to you how he killed the man?

A No.

Q But that was his words; is that

correct?

A (The witness nodded affirmatively).

Q Where were you when this conversation was going on?

A I was three cells down from him.

Q When you say "he", the man that made these statements that you indicate, do you see him in the courtroom today?

A Yes, I do.

Q Would you point the man out that said he killed the man?

A He's sitting right over there.

Q For the record, you're referring to the defendant in this case, Coleman Wayne Gray?

A Yes, I am.

Q Now, Mr. Ferrell, after you received or heard this information did you have occasion to send a letter to the commonwealth's attorney in Chesapeake regarding at least that you had information in this regard?

A Yes, I did.

Q Mr. Ferrell, I show you this letter and ask if this is the letter you sent to Mr. Kowalsky, the commonwealth attorney, in Chesapeake?

A Yes, it is.

Q Is that your writing as well as your signature?

A Yes, sir.

Q And is that where you sent it to him?

A Yes, sir.

MR. FERGUSON: Your Honor, I would ask that the letter that he wrote to Mr. Kowalsky be marked and introduced into evidence as a Commonwealth's exhibit.

MR. EASON: Your Honor, if I may examine the letter.

MR. FERGUSON: Excuse me. I thought I gave you a copy.

MR. EASON: I'd like to see the original, and I haven't read it yet, either.

MR. FERGUSON: I'm sorry.

(The letter was read by Mr. Eason).

MR. MURDEN, CLERK: "43".

MR. FERGUSON: I have no further questions for Mr. Ferrell.

CROSS EXAMINATION

BY MR. MOORE:

Q Mr. Ferrell, you're obviously not incarcerated at the present time: is that correct?

A No, sir.

Q When did you get out of jail?

A October 15th.

Q When was the agreement made that

you would come testify today?

A When was the agreement made?

Q Yes.

A It was no agreement made. I was subpoenaed.

Q When did you talk with the commonwealth's attorney?

A I believe it was Monday.

Q Monday of this week?

A Yes, sir.

Q What were you in jail for?

A Burglary and arson. I believe it was burglary and arson.

Q Burglary and arson?

A Arson.

Q Were you convicted of those?

A Yes, I was.

Q How much time did you get?

A Twelve months.

Q You serve all of it?

A Yes, I did. Well, eight of the twelve.

Q Have you, other than the burglary and the arson that you were spending in the Chesapeake jail on, have you been convicted of any other felonies or misdemeanors involving moral turpitude, such as lying, cheating, or stealing?

A No; just misdemeanor bad checks.

Q How many?
A Three.
Q Three different charges or three different convictions?
A They were all in Chesapeake.
Q Three convictions?
A Yea.
Q And you say you were three cells down from this person who was making all these confessions; is that correct?
A That's right.
Q How many people were in each cell?
A One.
Q One person?
A In each cell.
Q And you were in one cell. Were you on the same side as Mr. Gray?
A Yes, I was.
Q Nobody was in the cell with you?
A No.
Q And who was in the next cell adjacent to you?
A A man named Donald.
Q Who?
A A man named Donald.
Q And the next cell down was who?
A Carl.
Q Carl? Next cell down was who?

A Coleman.
Q Coleman Gray? And you heard all this from four cells down; is that right?
A Yes.
Q Had you ever met this man before?
A No.
Q Never cellmates with him?
A Sir?
A Were you ever cellmates with him?
A No.
Q Did he ever introduce himself to you?
A No.
Q When did this conversation take place that you overheard?
A When did it take place?
Q Right.
A It was conversation the whole time he was there.
Q When was he there?
A Approximately end of July, first of August.
Q The end of July and the first of August?
A Yes.
Q And according to a copy of the letter here that's been introduced into evidence, the letter from you to Mr. Robert E. Kowalsky, that letter is dated

September 2nd; is it not?

A That's right.

Q Some thirty days or a month after Mr. Gray left the jail?

A That's right.

Q And you got out of the jail when in Chesapeake?

A October the 15th.

Q October 15th. So, he had been gone for some thirty days or a full month before you spoke up to the commonwealth's attorney; right?

A That's right.

Q Then right after you wrote the letter to the commonwealth's attorney you're on the street, right?

A Not right away, no.

Q Took a few weeks?

A Yea.

MR. MOORE: No further questions.

MR. MOORE, Continuing-

Q What is Carl's last name? You indicated a man that was incarcerated by the name of Carl. What was his last name?

A Seemed like to me it was Bond or Bonds, or something like that.

Q Bonds?

MR. MOORE: No further questions,

A I said I'm not sure of the exact date that I talked with him. I don't keep records of things like that. But I do know it was in July when I talked with Mr. Gray.

Q And you contacted Sergeant Moore of the Newport News Sheriff's Department that same day?

A I talked with Sergeant Moore on July the 5th. That's what the record indicates.

Q Your record indicates that?

A That's what the jail record indicates.

Q Did you contact Sergeant Moore the same day you spoke with Coleman Wayne Gray?

A Couple of days afterwards. But, I had talked with Mr. Gray several times before that. We had recreation together at least I say five or six times, maybe more, and there was two and-a-half to three hour sessions.

Q So you and Mr. Gray had met in the Newport News City Jail on at least five or six occasions?

A Yes.

Q Every one of those occasions was in the recreation department or the recreation room at the jail?

A In the recreation room, right. In the recreation room at the jail they have a section so that you can view wide screen T.V. Then they have a section so that you can sit down, if you want to

run some research or look at any law books, or what not; they have a section for that.

Q .. And these meetings would have taken place sometime during June and early July?

A April-- Wait a minute. June, July; yes. You're right. You're right.

Q June and July?

A Yes.

Q During that period of time you were in isolation over at the jail itself; were you not?

A Not because of any rule infractions, no. I was there by choice.

Q You were in isolation by choice?

A Yes. Well, it's not really isolation. It's not really isolation that I was in.

Q You were in isolation and in a single cell on various occasions for disruptions you were causing in the jail; were you not?

A That is not true at all.

Q Aren't you referred to over at the jail as the jailhouse lawyer?

A Some inmates look at it in that respect; yes.

Q When did you first know of these charges which were placed against Coleman Wayne Gray?

A When I talked with him at the city jail.

Q That very first meeting of those

five or six that you had?

A Yes. He was referred to me by an individual by the name of Gangrene, a guy that he knows here from Suffolk that's in the Newport News City Jail. Like I say, he wanted some information on these drug charges that he had pending against him and it was nobody in the jail that knew how to properly go about looking up the information, so he consulted me.

Q Okay. And you also indicated a few moments ago in questions from Mr. Ferguson-- Excuse me, maybe you did not indicate. I appologize. Let me rephrase that.

Have you ever told anyone that Mr. Gray told you that he had tied up the hands of Richard McClelland?

A Yes, I did.

Q Mr. Gray told you that?

A Yes, he did.

Q He told you that at the first meeting or at the last meeting?

A I don't know the exact meeting it was, so much that took place during our conversation. I didn't want him to think during the time I was trying to get any kind of information out of him or anything.

Q Okay.

A As a matter of fact, I probably wouldn't have-- I don't think I would have said anything at all, like I said, until the man just started laughing about what he did, you know, the fact that he killed

the man. This is what he confessed to me.

Q Mr. Smallwood, you're married; are you not?

A Yes, I am.

Q How many children do you have?

A Set of twin sons.

Q How old are they?

A Five years old.

Q And you would like to be with them and the family; wouldn't you?

A Sure would.

Q You know you're facing penitentiary charges.

A Yes, sir. I'm facing time in the penitentiary. Already got it.

Q And isn't it a fact you also even wrote Judge Smith, the sentencing judge in your case over in Newport News and asked for his consideration to help you out?

A Help me out in what way?

Q Any way he could.

A Sure, I did it.

Q And you'd do anything to get out of the penitentiary as quick as possible, get back to your family?

A No, I wouldn't do anything to get out. Not anything, no.

Q But you would do some things?

THE COURT: Well, if it's anyone that you think you might want to recall--

MR. FERGUSON: I would rather have them excluded.

MR. EASON: Is Michael Andrews in the court yet? He is on call and evidently on his way over, Your Honor.

THE COURT: All right, sir.

(The witnesses were excluded.)

DEPUTY WALTER MAXWELL, having been first duly sworn, was called as a witness on behalf of the Defendant and testified as follows:

DIRECT EXAMINATION

BY MR. EASON:

Q Would you state your name, please?

A Deputy Walter Maxwell.

Q And Deputy Maxwell, where are you employed?

A Newport News Sheriff's Department.

Q And what is your position with the Sheriff's Department, Deputy Maxwell?

A Presently? A recreation officer there.

Q Okay. At the present time is there an inmate in your jail by the name of Jeremiah Smallwood?

A Yes, it is, sir.

Q All right. Do you have with you today those records that you keep regarding inmates and the recreation room use?

A Yes, I do.

Q It is your duty as a deputy sheriff for Newport News to be in charge and to keep those records?

A Yes, sir.

Q Could you tell the jury and the Judge from your examination of those records what times if any that Jeremiah Smallwood and Coleman Wayne Gray would have had access at the same time to the recreation room in the Newport News City Jail?

A Okay. Upon looking at my records there were five separate times that the two inmates in question had the opportunity to be in the rec room at the same time, but only on two occasions were they actually in the rec room at the same time.

Q The two occasions were which dates?

A The 26th of June '85, and the 3rd of July.

Q 1985?

A '85; right.

Q Those other three occasions, why did those-- You said there were five total occasions. On those other three occasions they did not meet in the rec room; is that correct?

A Correct.

Q Okay. Is that because Mr. Gray was not available to go to the rec room, or did not desire to go to the rec room?

A On two of those occasions Mr. Gray had refused. On another occasion he was in Suffolk court.

Q Okay. Mr. Smallwood, who is still in your city jail, is presently what-- Excuse me. At the time back, of May and June and early July, what was his status within the jail as far as his bedding and rooming is concerned?

A He was in isolation. I do not know the exact date, but during that time span he had set a fire in his cell and he was placed in isolation. Fifteen minute checks were brought up on him. He was watched very closely at that time.

Q Was he causing other disturbances in the jail during his course or period in there?

A Nothing violent, per se, but we did keep him isolated per order of the medical staff for a psychological or medical reasons. I'm not exactly certain what.

MR. EASON: Thank you, Deputy Maxwell. Answer Mr. Ferguson.

CROSS EXAMINATION

BY MR. FERGUSON:

Q Deputy Maxwell, your records do indi-

cate that Jeremiah Smallwood and Coleman Gray were, in fact, together, had access to each other, had an opportunity to talk to each other on both June 26th as well as July the 3rd; isn't that correct?

A Yes, sir.

Q Are you aware of your own knowledge of the fact of Mr. Smallwood contacting one of your deputies or officers in an attempt to try to get in touch with the Suffolk Police Department relative to information he had on July the 5th?

A I'm not aware of it, sir.

Q You're not aware of that?

A No, sir.

Q All right. And, of course, what you have testified to here is based on the records that you have at that particular time.

A Yes, sir.

Q But under any circumstances, at least on June 26th and July 3rd they had access to each other, were able to carry on conversations and other things?

A Definitely, sir.

Q Is it not also true that sometimes they may have had contact with each other without some formal logging being made? Sometimes can't things be done on a casual or an informal basis?

A It was possible. At one time they were both housed on the same floor, so in transporting

they could have possibly contacted each other.

Q Well, that's what I'm saying. There are other instances where they may have had contacts that were not specifically noted in logs and things of that sort?

A Yes, sir.

Q But your logs do indicate on at least two occasions that you have indicated even the records indicate they were together and had an opportunity to converse and carry on conversations and that kind of thing?

A Yes, sir.

MR. FERGUSON: That's all I have. Thank you very much.

MR. EASON: We have no other questions for Deputy Maxwell.

THE COURT: Do you need him any further?

MR. EASON: No, sir. He can be excused as far as we're concerned.

MR. FERGUSON: I have no need for him.

MR. EASON: Sergeant Lilley.

SERGEANT CARL E. LILLEY, having been first duly sworn, was called as a witness on behalf of the Defendant and testified as

follows:

DIRECT EXAMINATION

BY MR. EASON:

Q You are Sergeant Carl Lilley, who has earlier testified; is that correct?

A Yes, sir.

Q Sergeant Lilley, you've already testified that you had occasion to meet with one Sylvester "Jake" Joyner here in the Suffolk City Jail; is that also correct?

A Yes, sir.

Q And just one question, Officer Lilley. During that meeting with Mr. Joyner is it not true that Mr. Joyner asked you if you had any pull with Mr. Ferguson, the Commonwealth's Attorney, to influence him or ask him to drop the drug charges against him which were pending at the time of the conversation?

A Yes, sir.

MR. EASON: That's all I have.

CROSS EXAMINATION

BY MR. FERGUSON:

Q Sergeant Lilley, at that particular time that you first talked with Mr. Joyner, did he contact you?

A He contacted me.

Q All right. And did he provide you

A He was talking to myself and another inmate, Mr. Bobby Angel.

Q Did you overhear all the conversations?

A Yes, I was right next to them. Couldn't help but hear it.

Q And what did Mr. Gray ever say about his role in the crime?

A He said he was-- he always maintained his innocence. He said that, what the evidence that the policeman had were, you know, it wasn't, you know-- He told me about the evidence the police allegedly had. He stated they found a fingerprint on a receipt of a credit card, said something about the police had said they had found a gun in some water, and he also said that him and his wife were completely innocent.

Q So, he was talking about the crime to ya'll down there?

A Yes, sir.

Q Anybody down there could have heard him talking about the crime?

A Yes. Yes.

Q Did he ever say anything other than that he was innocent?

A No. He maintained his innocence the whole time I was there. He never said he was guilty in any way.

MR. MOORE: No further questions.

Q But isn't it true as it regards inmates?

A I wouldn't know. I'm not in the general population.

MR. FERGUSON: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. MOORE:

Q When did you first hear about this case; that you may be called as a witness to testify?

A Pardon?

Q When did you first hear that you might be called as a witness to testify in this case?

A A member of the Suffolk law enforcement agency, they contacted me at first.

Q When was that?

A About two or three weeks ago.

Q And wanted to see what you had to testify about?

A Yes, sir.

Q You told them at that time the same thing you told me today; is that right?

A Yes, sir.

MR. FERGUSON: Let me just ask a couple of questions.

RECROSS EXAMINATION

BY MR. FERGUSON:

Q Mr. Bond, at that time didn't you tell the Suffolk law enforcement agency that the events were not very clear in your mind because it happened so long ago, and that immediately after the incident had happened you contacted Detective Slezak? Isn't that what you told him? Isn't that true?

A No. I had contacted-- I had offered to contact-- I was listening out for Mr. Gray to give evidence concerning his involvement in the slaying--

Q Not in this Murphy's Mart you weren't?

A Yes, I was.

Q By who?

A I was waiting on any-- in either case, it made no difference. It made no difference at all.

Q I see. Who asked you to try to gather evidence as it related to the Murphy's Mart case.

A No one asked. No one asked me at first. I had volunteered to Vessie of the Chesapeake Sheriff's Department any information that I did receive.

MR. MOORE: Your Honor, I have a motion for the Court right now. If we could have the jury excluded, please.

MR. FERGUSON: All right.

THE COURT: All right. Would you

take the jury out, please?

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND THE FOLLOWING MATTER WAS TAKEN UP OUTSIDE OF THEIR PRESENCE.

MR. MOORE: Your Honor, I move for a mistrial. Mr. Ferguson has brought forth evidence and put into the record of a statement that this man made to police officers which is exculpatory. The Court has ordered the Commonwealth Attorney to make the defense aware of all evidence that the Commonwealth may have that was exculpatory. It should have been made available to us. Now, they had this man three weeks ago, and he told them at that time that he was in that jail cell and that Gray was down there and he made nothing but a confession of innocence.

At the same time the Commonwealth brings another witness in here who tells ycu the contrary. That's a statement that the Commonwealth had. Now it's trying to impeach this man with exculpatory evidence. We were entitled to it. The Commonwealth has violated the Court's order and I respectfully move for a mistrial.

The evidence has been brought in before the jury right now pertaining to this particular matter. It's going to taint their opinion of this, and there is no other remedy available to the Court other than to declare a mistrial at this time.

In the alternative we would ask the Commonwealth to be forced to stop this line of questioning because it's getting to an area that's apparently going for mistrial in this case in any event.

THE COURT: Well gentlemen, I'm going to cut out this business. We're getting into an area involving maybe some other crime, and I don't want to get into that. If we get into that you are going to have a mistrial.

Now, as far as the statment is concerned I don't know what statement he gave the police officers, but, in any event he is here, he is available, and he has testified.

I'm going to overrule your motion for a mistrial.

MR. FERGUSON: Your Honor, I would just refrain it simply to attacking his statement as it relates to this particular thing, whether he made these statements.

THE COURT: Well, I gathered you were getting into some other area.

MR. FERGUSON: I will avoid that, Your Honor.

MR. MOORE: Your Honor, right now I would also--

THE COURT: Let me see the statement that he made.

MR. FERGUSON: Your Honor, the only questions I wanted to ask him were in reference to

TRIAL CONTINUING IN THE FOREGOING MATTER ON DECEMBER 6, 1985, AND THE FOLLOWING MATTERS WERE TAKEN UP IN THE JUDGE'S CHAMBERS PRIOR TO THE COMMENCEMENT OF THE TRIAL.

PRESENT: Mr. C. Phillips Ferguson, Attorney for the Commonwealth

Mr. Carl E. Eason, Jr., Counsel for the Defendant

Mr. James A. Moore, Counsel for the Defendant

Mr. Henry C. Murden, Circuit Court Clerk

MR. MOORE: Your Honor, we have a motion with respect to the scope of the evidence admitted to be presented by the Commonwealth during the penalty trial today in this case.

The Commonwealth is relying on Watkins v. Commonwealth, which is a recent Supreme Court case, 229 Va., decided in June of this year. He's relying upon that case to bring in potential evidence that the defendant, Wayne Gray in this case, committed another murder. And the Commonwealth has admitted, has given us the suggestion that he intends to put evidence on of the photographs of the victims of that murder as well as other evidence of that murder.

Now, this Court has ruled in our favor when

we argued Peterson at the beginning of these proceedings, and the Peterson case was a Virginia Supreme Court case that set forth that it was preferred practice for the Commonwealth's Attorney to reveal to the defendant upon the completion of the capital murder trial, assuming that the defendant was convicted of capital murder, and prior to the penalty trial, it was preferred practice that the Commonwealth's Attorney make known to the defendant what evidence he intends to adduce at the penalty trial. And you have ruled in our favor on that and Mr. Ferguson accordingly yesterday in the afternoon of December 5th gave us information as to the evidence that he intends to adduce today. And that evidence, for the first time made known to us, was that he intends basically to put on evidence to try or go a long ways in trying another murder.

This is the first time that Mr. Eason and I heard that he would do anything other than put on inmates' statements, supposed inmates' statements, that our Mr. Gray had made to fellow inmates that he killed the Sorrells.

We were made aware of that on Monday morning by Mr. Ferguson. He said that he had people that would come forth and say that he not only did the Sorrells but committed other murders, and we were prepared for that, argumentatively and evidentiary-wise.

However, we are not prepared to rebut, put on any rebuttal evidence because of the shortness of notice. We are not prepared to try the Sorrell murder today. We have not been given sufficient notice.

The case relied upon by the Commonwealth, Watkins v. Commonwealth, was an entirely different situation from the one we have today.

THE COURT: Well, tell me what evidence you're complaining about here.

MR. MOORE: I'm complaining about anything other than statements he may have made to a fellow inmate. If he's going to take one statement that he made or two statements he may have made to a fellow inmate and then based on that statement bring in pictures of the victims, I think that goes beyond the scope. He can't try it.

THE COURT: Well, the cases hold that you can do that, though, Jim.

MR. MOORE: Well, I don't think so, Judge, because in this case-- In the Watkins case the defendant had been charged with two murders. The lawyers who were representing him in the first murder trial were already representing him with respect to the second murders. They were aware of all the charges, were aware of the evidence that was available to the Commonwealth in the second

murder charge and were in a position to confront the evidence possibly that would come in the penalty trial.

We have a different situation here. This situation today, of being able to try the Sorrell murder in effect in this trial, is different from the Watkins situation because in the Watkins situation he had been charged.

THE COURT: Well, what you are complaining about is the photographs; is that right?

MR. MOORE: I'm complaining about him bringing in fingerprints or the photographs or anything of that nature.

MR. FERGUSON: We are not bringing in fingerprints. We are bringing in the officer that went to the scene of the crime and what he found to just show that a crime did occur and what was there, and secondly, to bring in Dr. Presswalla to show the cause of death and the nature and extent of the injuries. And that's it.

MR. MOORE: Well,I think that he can't go beyond the statements. But what he's doing, he puts a statement in that he did it and brings all that in. In essence, what he's doing is trying that case in the minds of the jurors. And my narrow argument, Your Honor, is that it is beyond the scope of Watkins because in Watkins when they did that, obviously they did it in Watkins,

the man had already been charged. His lawyers were aware of the charges. The defendant was aware of the charges. The lawyers were able to take precautions and rebuttal and be prepared for those things.

We are not prepared for any of this, other than he may have made some incriminating statements. It's beyond the scope of Watkins.

MR. FERGUSON: Your Honor, the problem is Watkins doesn't say that. Watkins goes on and says you can adduce evidence in the case. As to whether a man's charged or not is totally irrelevant. It goes way beyond that scope and, in fact, in Watkins they brought in the medical examiner, photographs, and they didn't even have a confession of the defendant in that case. In fact, they had to rely on a co-defendant's testimony as to the facts of the case itself. And it's very clear from the-- I didn't bring my law with me but I have got the case and I can point that out to the Court.

THE COURT: I think the Court has held that you can go into unadjudicated matters.

MR. FERGUSON: Whether charged or not.

THE COURT: Which would be the-- I mean, if you can get in the fact that he made a statement.

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MR. MOORE: I agree with you, Judge. I agree that the statement can come in. That statement can come in, the fact that he said it. Not for the truth of the matter. But if they go one step further, if they go one step further and say, Well, he said this statement, let's go take a good look at all the gory bodies of the victims and everything, I think that's just highly inflammatory.

THE COURT: Well, this is at that stage of the trial, though, Jim.

MR. FERGUSON: That's what I have got to prove to get the death penalty. I have got to prove that.

THE COURT: You have got to prove the vileness, the depravity, or the future dangerousness of this man in order to make a case for the death penalty. Just as you have got to play it down, he's got to play it up.

I think it's admissible at this stage of the trial. Certainly it would not be admissible at any other stage.

MR. MOORE: All right. Note my exception for the record, Judge. That's all I have, Judge.

THE COURT: All right. Okay.

MR. FERGUSON: Your Honor, I need to get one thing.

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TRIAL CONTINUING IN THE COURTROOM.

PRESENT: Mr. C. Phillips Ferguson,
Attorney for the Commonwealth

Miss Nancy G. Parr,
Assistant Attorney for
the Commonwealth

Mr. Carl E. Eason, Jr.,
Counsel for the Defendant

Mr. James A. Moore,
Counsel for the Defendant

Mr. Coleman Wayne Gray,
The Defendant.

THE MEMBERS OF THE JURY PANEL WERE PRESENT AND SEATED IN THE JURY BOX.

THE COURT: All right, gentlemen, are you ready?

MR. FERGUSON: The Commonwealth's prepared, Your Honor. Has Lawrence Tucker come in yet?

MR. MOORE: The defense is ready, Your Honor.

MR. FERGUSON: We have one witness, Your Honor, he hasn't come in but I think we can go ahead and proceed.

THE COURT: All right. Call your witnesses.

MR. FERGUSON: Would all the Commonwealth witnesses stand? We have several that

002069

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MR. FERGUSON: No, sir. Call Detective Slezak.

MR. MOORE: Your Honor, I have a motion I would like to make out of the presence of the jury, please.

THE COURT: All right. Ladies and gentlemen, step in the jury room, please.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM AND THE FOLLOWING MATTER WAS TAKEN UP OUTSIDE OF THEIR PRESENCE.

MR. MOORE: Your Honor, at this time I would like to renew my motion to have excluded from evidence during this penalty trial any evidence pertaining to any other-- any felony for which the defendant has not yet been charged. The basis for this would be that it beyond the scope of what's been testified to. What's been testified to is we have a statement from someone who said the statement was made to him. We don't have any evidence that this man has been charged with the Sorrell murders. We don't have any evidence that he's been indicted by the Sorrell murders. All we have here is a statement made to an inmate. And if the Commonwealth's Attorney wants to introduce hardcore evidence as a result of those murders to the jury it will do nothing

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002118

more than inflame the jury and will infer precisely and concisely that this man did the killing, which, in essence, will mean that he will have been tried of the Sorrell murders right in our very presence today.

And as I have argued to the Court earlier in this trial today, we have had no notice of this, short of the last twenty-four hours we have had notice of it. Mr. Eason and I have not had the time to prepare to defend the defendant with another murder charge. He's not been indicted.

We understand that the authority relied upon by the Commonwealth is Watkins vs. Commonwealth, a recent decision, but our position is that this scope that the Commonwealth intends to enter at this time, that the scope of the evidence to be adduced by the Commonwealth at this time is beyond the Watkins case because the Watkins case in which one murder, of a defendant convicted of murder as is to Gray right here, is when the Commonwealth during the penalty trial put on testimony of another murder. It was of another murder, that of which the defendant had already been charged. It was another murder that the defense counsel were actively participating in representing the defendant.

And we ask, Judge, not to allow this evidence. Defense was taken by surprise. And the jump from Mr. Gray's statement to the co-defendant-- and that's

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all we have here, the co-defendant's admission, who we know has made an agreement with the Commonwealth. The Commonwealth wants to get from Melvin Tucker to the photographs of the Sorrells. It's too great a jump, too broad a jump and only serves to inflame the passion of the jury so that justice in this particular case cannot be rendered. And we ask that the evidence be excluded for that basis.

MR. FERGUSON: Your Honor, on this issue there are a couple of things I'd like to state. First of all, I would state for the record that I advised Mr. Moore prior to yesterday afternoon. They were well aware that the Commonwealth intended to introduce evidence. In fact, I told him before this trial began that the Commonwealth-- that if this defendant was found guilty at the sentencing phase we intended to introduce evidence which would show this defendant has confessed to other crimes involving murder, specifically the Sorrell murder.

In addition, Mr. Moore was fully aware of that fact.

The Commonwealth, at this point, has introduced evidence which if believed by this jury would be sufficient, coupled with obviously establishing the corpus delicti, that he could be convicted.

The Watkins case is very clear on cases or crimes where a person has not been convicted.

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The Watkins case says,"itis essential that the jury have before it," and it underlines it,"all possible relevant information about the individual defendant whose fate it must determine." "We have also held to be admissible in the sentencing phase evidence of other crimes for which a defendant has not been convicted."

It's very clear that the Commonwealth is entitled to introduce this evidence because this evidence goes to the whole thrust of what the Commonwealth must prove in a sentencing hearing, and that is that this defendant has a proclivity for violence and that he does represent a high degree of future dangerousness to the community. And the Commonwealth must establish that fact through the evidence and must prove it beyond a reasonable doubt that he would represent a probability of future dangerousness.

What better way to prove future dangerousness than to show that this man has committed other murders? And that's precisely what the Commonwealth is doing.

I think based on the Watkins case, the Quintana case, as well as the Peterson case the Commonwealth is clearly without any question whatsoever entitled to introduce this evidence.

I would therefore respectfully ask that the Court overrule defense counsel's motion.

MR. MOORE: Your Honor, I would like to take a matter up with the Court. I hate to

take up any more time, however, the Commonwealth has mis-stated something that's put the shadow on the defense counsel, and I want to clear it up.

He has stated that he made this available to us at the beginning of the trial. That is not true. He said that he was going to bring in statements that our man had confessed, that Gray had confessed to other people. That is true. We were aware of that. We were prepared for that.

But, what he is going to do today is not what he said he was going to do at the beginning of trial. He said he was going to bring in evidence that he, that Gray, had confessed to other people.

My point is that we were ready for that. That's alright. But now, within the last few hours we learn that not only is he going to get that in, which we were prepared for, he's going to put on photographs of people, which we're not prepared for, and goes beyond that.

So, if he's going to mislead anybody as to what we were told, I want to clear the record up for that right now. We were not told this was coming in.

THE COURT. Well, gentlemen, you were aware of it yesterday.

MR. MOORE: Yes, sir. That's too short a time to be prepared for it.

THE COURT: At the conclusion of

the guilt stage we discussed the penalty stage, and at that time Mr. Ferguson made you aware of what his evidence was going to be. I'm going to overrule your motion and note your exception in the record. let's take a short recess.

MR. MOORE: Thank you.

TRIAL CONTINUING IN THE COURTROOM AFTER A BRIEF RECESS AND THE MEMBERS OF THE JURY PANEL WERE PRESENT IN THE COURTROOM AND SEATED IN THE JURY BOX.

THE COURT: All right, sir.

MR. FERGUSON: Call Detective Slezak.

DETECTIVE M. I. SLEZAK, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A M. I. Slezak, police officer, City of Chesapeake.

Q And Detective Slezak, would you

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MR. FERGUSON: I have no further questions. I would ask that Detective Slezak remain. I don't think I'll need him, but rather than release him this second I would ask him to remain just momentarily.

THE COURT: All right. That's all.

MR. FERGUSON: Dr. Presswalla.

(Discussion off the record.)

DR. FARUK B. PRESSWALLA, having been first duly sworn, was called as a witness on behalf of the Commonwealth, and testified as follows:

DIRECT EXAMINATION

BY MR. FERGUSON:

Q Would you state your name for the Court and members of the jury, please?

A Faruk, F-a-r-u-k, Presswalla, P-r-e-s-s-w-a-l-l-a.

Q And what is your position or occupation, Dr. Presswalla?

A I'm the Deputy Chief Medical Examiner for the Tidewater Region.

Q And in that capacity what do you do? What is your function in that capacity?

A I investigate sudden, unexpected,

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unusual, unnatural, and violent deaths, deaths in legal custody, and deaths in which cremation or disposing at sea is the method of disposition of the body.

And in the course of the investigation I do autopsies when necessary with a view to determining the cause and manner of death, and obtaining any medical, legal information which may help explain the circumstances surrounding the death.

Q Can everybody on the jury hear? All right. If you can't if you would raise your hand, I'll get him to sepak up. Thank you.

Now Dr. Presswalla, how long have you been a medical examiner with the State of Virginia?

A For the past approximately nine years.

Q All right.

MR. FERGUSON: Mr. Eason, is there any question about his qualifications as an expert?

Mr. Eason: We would certainly stipulate as to his qualifications, Your Honor.

THE COURT: All right, sir.

MR. FERGUSON, Continuing-

Q Dr. Presswalla, in that regard did you have occasion to examine and conduct an autopsy on the bodies of Lisa Sorrell and Shanta Sorrell?

A I did.

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Q All right. And Dr. Presswalla, would you tell us when did you make this examination of those two people?

A This was on the 11th of December, 1984.

Q And what did your-- Let's take them one at a time. What did your examination of Shanta Sorrell reveal?

A Shanta Sorrell was a baby, three years old, and my examination revealed that she had died as a result of carbon monoxide inhalation. Carbon monoxide is a noxious gas which is produced any time there is incomplete combustion. So, whenever there is any kind of combustion part of the combustion is complete, which produces carbon dioxide, and the part that's incomplete produces carbon monoxide.

This is present in any fire, whether it be smouldering or hot. It's also present in automobile exhausts. She died as a result of inhaling this which then combined with the hemoglobin in the blood and therefore prevented the blood from carrying oxygen, and kills the person.

Q Dr. Presswalla, did you examine specifically, the windpipe of her body?

A Yes.

Q What did you find in the windpipe?

A I found evidence of soot inhalation, that is, carbon from smoke. This is something that

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would take place with a fire, especially if there is smouldering. You do not see soot if it's from the automobile exhaust.

Q All right. And Dr. Presswalla, did you have occasion to file your report in this particular case regarding Shanta Sorrell?

A I did.

Q Dr. Presswalla, I show you first of all this photograph and ask if you can identify that photograph for the members of the jury?

A Yes, I can.

Q And who is that a photograph of?

A This is Shanta Sorrell, on whom I performed this autopsy, about whom I was referring just now.

Q Dr. Presswalla, does this medical examiner's report, is this your report that you filed in this particular case, excluding the hearsay information about how you came into contact with the bodies and those kinds of things?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I would like the record to reveal that we have struck from the summary certain hearsay information about how the body was discovered, where it was discovered, that Dr. Presswalla, I assume, has no personal knowledge of; is

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that correct?

THE WITNESS: Well, that was reported to me in the normal course of business by my local medical examiner who went to the scene. I did not go to the scene.

MR. FERGUSON: Right. That's fine. Your Honor, we would offer the photograph into evidence as Commonwealth's Exhibit Number—

MR. MURDEN, CLERK: "53".

MR. FERGUSON: And the autopsy report as Number "54".

MR. EASON: Your Honor, we have no objection to the report as it has been changed by the Court, of course, subject to our continuing objection on the whole matter.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, did you also conduct an examination and autopsy on Lisa Sorrell?

A Yes, sir; I did.

Q Would you tell us the results of that examination?

A Lisa Sorrell was a young lady, and she showed evidence of gunshot injuries. She had six gunshot wounds to the back of her head, all located in an area to the back and to the right of the midline, right about here. (Indicating.) Of these six gunshot injuries, two of the bullets had

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passed through the head and exited and I could not find those bullets. The other four had stayed in the head and I recovered those bullets and they appeared to be .32 caliber bullets. Apart from the gunshot injuries she had only a minor scrape on her wrist.

Q Dr. Presswalla, I show you this photograph and ask you if you can identify that for the members of the jury?

A Yes, I can.

Q What is that?

A This is a photograph depicting the back of the head where I shaved the head to depict the gunshot wounds of Lisa Sorrell.

Q All right. And I show you this second photograph and ask you if you can identify that?

A Yes. That's a closer view of the same area.

Q All right. Shows it more clearly, the six wounds?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, I would ask that these two photographs be marked and introduced into evidence as Commonwealth's exhibits in these cases.

MR. FERGUSON, Continuing-

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Q Finally, I show you this medical examiner's report and ask if that is the report that you filed in these proceedings and sets forth the nature and extent of the wounds?

THE COURT: I'm only going to admit one of them.

MR. FERGUSON: I will simply offer, the first one will be sufficient. I think it shows the face, as well as the wounds. That's sufficient.

THE COURT: All right.

MR. MURDEN, CLERK: "55".

MR. FERGUSON, Continuing-

Q Does this reflect your report, Dr. Presswalla?

A Yes, sir; this does.

Q And as in the other case, I believe, in the report that is being filed any evidence which may constitute hearsay, that is that you didn't have, was deleted from the report or from the summary; is that correct?

A Yes, sir.

Q All right.

MR. FERGUSON: Your Honor, we would offer these two exhibits into evidence as Commonwealth's exhibits. I would withdraw the earlier.

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THE COURT: That's the one you want?

MR. MURDEN, CLERK: That's been marked.

THE COURT: That's the one you handed me that you wanted.

MR. FERGUSON: I appologize. I misunderstood the Court. It makes no difference.

MR. MOORE: If it doesn't make any difference, we want the smaller one.

MR. FERGUSON: It makes no difference. That's fine. I'll simply withdraw this one.

MR. FERGUSON, Continuing-

Q Now Dr. Presswalla, specifically were you able to determine the cause of death first of all of Shanta Sorrell?

A Yes, sir; I was.

Q What was the actual cause of death?

A She died as a result of carbon monoxide intoxication.

Q And were you also able to determine the cause of death of Lisa Sorrell?

A Yes, sir; I was.

Q And what was the cause of death of Lisa Sorrell?

A She died as a result of multiple gunshot wounds, namely the six gunshot wounds to her head which injured her brain.

Q Dr. Presswalla, in reference to

Lisa Sorrell, could you tell us whether any one of those six wounds to the back of the head could have been fatal?

A Yes, sir.

Q Any one of the six would have been fatal alone?

A Yes.

Q All right.

MR. FERGUSON: Your Honor, I have no further questions for Dr. Presswalla. I would like to show the exhibits to the members of the jury.

THE COURT: All right, Mr. Moore?

(The previous exhibits were published to the jury.)

MR. EASON: We have no questions, Your Honor.

THE COURT: All right. Do you need Dr. Presswalla any further?

MR. FERGUSON: We have no further need for Dr. Presswalla. As far as I'm concerned he's free to be excused.

THE COURT: All right, Doctor, thank you. You may go.

THE WITNESS: Thank you, sir.

MR. FERGUSON: Your Honor, the Commonwealth rests.

MR. MOORE: Your Honor, the defense

MR. EASON: That's all of our evidence, Your Honor.

THE COURT: Is that the case?

MR. FERGUSON: We have no evidence.

THE COURT: All right. Have you got the instructions, Mr. Murden?

MR. MURDEN, CLERK: Yes, sir.

THE COURT: Ladies and gentlemen, at this time I'm going to read the instructions that apply to the penalty stage of this case, and you will take them with you when you go to your jury room.

We have also prepared the form of verdict for your use. It's in an alternative form. There are four different findings that you can make, and I will explain these to you.

Now, the first instruction is: You have convicted the defendant, Coleman Wayne Gray, of capital murder, which may be punished by death. You must decide whether the defendant shall be sentenced to death or life imprisonment.

Before the penalty can be fixed at death the Commonwealth must prove beyond a reasonable doubt at lease one of the following two alternatives:

1. That after consideration of his history and background there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or

2. That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

Depravity of mind is a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.

Aggravated battery is a battery which is qualitively and quantitatively more culpable than the minimum necessary to accomplish an act of murder.

The Court instructs the jury that in determining what punishment may be imposed you may consider any evidence of mitigation either offered by the defendant or shown by other evidence.

Now, in the alternative jury verdicts that you have, ladies and gentlemen, the first of these encompasses both of the alternatives and that reads:

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Or, you may find one of the next two alternatives:

We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

the house, saw the money, approximately a thousand dollars worth of money in his apartment, and asked him how it occurred. And Melvin went into some detail, what Coleman Gray said: He and his wife were both involved in this particular crime. The wife was the driver of the get-away car and Coleman Gray was the man that actually went in the place at gunpoint, held up the two employees and put them in the freezer.

And Tucker asked him a question, Well, was the freezer cold? Coleman Gray was going to leave them there. And I ask you what would have happened to those people had Melvin Tucker not called the police and notified them of what had occurred? These people would have been locked in a freezer for a long period of time and perhaps these people would have died as well.

You have also heard testimony in this particular case from Melvin Tucker relative to a statement that the defendant made to him relative to the Sorrell murders. And the defendant, Coleman Gray, told Tucker as they were going up the steps one day—it was some girl that had been saying things or the rumors were going through the neighborhood about his involvement in the Murphy's Mart case-- and Coleman Gray, in very graphic language indicated that he could take her off just like he had taken some other girl off.

And then when he went upstairs when he was talking about that other girl, he showed Melvin Tucker

who he was talking about in the newspaper and pointed to a picture of Lisa Sorrell.

Now, you have heard testimony from Detective Slezak in this case, who went to the scene and discovered the automobile where the body of Lisa Sorrell, the mother, and a young child were found in the trunk, and the testimony and the evidence has shown that that car was set on fire just like the one in the Richard McClelland case. And not only that, but that the method of death, the method of execution for Lisa Sorrell was by .32 caliber weapon, same caliber weapon as we have in this case, six shots to the back of the head-- identical to the Richard McClelland case. She was stuffed in the car, matches found on the seat, tried to burn the car up; obviously the fire went out.

But it didn't go out in time enough for Shanta Sorrell, for Shanta Sorrell was put in the trunk of that car. That child had no way to get out, and she lay there and died of carbon monoxide poison with soot backed up all in her throat, and Dr. Presswalla indicated that was from the fire, not from any gasoline or car running. When you find soot in the throat that's from the car being burnt up.

Now, members of the jury, if that pattern of criminal conduct does not indicate a person who would have a probability of continuing to commit criminal

acts of violence or criminal acts in the future, then there is no such record that can, for the crimes that you have heard about that this defendant has committed and been convicted of, or alternatively admitted doing, are simply atrocious. They're murder, robberies, brutal systematic execution-style crimes; and those crimes are the same kinds of crimes that you had before you when you heard the facts on the Murphy's Mart case.

So, when you couple the vileness of the Murphy's Mart case itself and look at this man's prior criminal history it leads to one and only one conclusion, and that is that Coleman Wayne Gray, after considering his history and background, not only there's a probability, but that frankly there is an absolute certainty that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

So, based on that evidence there can be no question that the Commonwealth in this case has not only proven beyond a reasonable doubt, but has proven beyond all doubt that this defendant has a propensity to future dangerous criminal conduct. On that prong alone you, as members of the jury, have the right to impose a penalty of death.

In this particular case you do not have to rely solely on that prong of the test, for you can, in addition to that, go to the second test, and

to commit future crimes of violence. There can be no question about that. He's committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter; and he shot Ron Whitte, and it's fortunate that the last bullet didn't strike him or one of the members of his family.

This man has no conscious at all, and rather ironically, I think the real key that really exemplifies what this case is all about was the statement that was made by Jeremiah Smallwood, a man who came here today and testified, he's got absolutely nothing to gain. He's got to go to the penitentiary. And he told you that, I wouldn't even have said anything except for one fact, when the man talked about killing Mr. McClelland he laughed and thought it was funny.

Well, members of the jury, if that was funny then he must have been looking at different pictures than I would say that you-all looked at as it regarded Richard McClelland, because there was nothing funny about those pictures. In fact, they were brutal, they were atrocious, they were vile, they were horrible, and as inhumane as one person can be to another.

I suggest to you members of the jury that we are not asking for revenge in this case. We have proven to you both prongs of the test beyond all

doubt, and when you consider those facts the decision really makes itself. For if this is not an appropriate case for the death penalty, then I suggest to you there is no such case, both as to his prior record and acts of criminal violence and also as to the atrociousness of this crime itself.

I ask you for one thing in this case-- two things. Number one, I ask you to impose the penalty of death. That's not an easy thing to ask, and I'm sure it's not an easy thing for any of you to do. But, it's the only penalty that will bring justice in this case. And that's what we are here for, is to see that justice is done.

Should the innocent victim in this case, Richard McClelland, be required to serve a punishment greater than that which is administered to his murderer, Coleman Gray? Certainly not.

I think what it boils down to is there are simply certain crimes in which a defendant demonstrates that he is no longer capable of living in the human society, and Coleman Wayne Gray has demonstrated that in this case. He's demonstrated it in the Whitte case. He's demonstrated it in the killing of the man in California, and he's demonstrated it in the brutal manner in which Lisa and Shanta Sorrell were murdered.

This man has forfeited his right to live with other human beings, not because of anything

anybody's done to him, but by his own acts.

Members of the jury, I ask you to remember all these facts. I ask you to go to your jury room and return a verdict of death, and I ask you to do so on the basis of both prongs of the test, that is the first form on the jury verdict form of the four possible verdicts; for I again suggest to you that we have proven in this case beyond all doubt that he falls into both categories.

There is really very little I can say at this point. I have said all that really can do. The only thing I can leave you with is this: Coleman Wayne Gray has been tried. He has had twelve jurors to sit and listen to this case. He has had a separate penalty hearing. He's been represented by very capable attorneys. He has been afforded all due process there is.

Unfortunately, the same cannot be said for Richard McClelland, for he was charged, tried, convicted, and systematically executed without anything or having done anything whatsoever. The only justice in this case is that the murderer receive at least the same fate as that of Richard McClelland, for he should not receive a lesser punishment. Thank you.

THE COURT: Let's take a short recess, ladies and gentlemen.

your sitting in judgment of another human being. Let me ask you a question: Did Coleman Gray sit in judgment of Richard McClelland; did he sit in judgment of Ron Whitte; did Coleman Gray sit in judgment of the man in California that he killed; and did he sit in judgment of Lisa and Shanta Sorrell without charges, without trial, without due process, without anything, other than a gun?

Nobody put the gun in his hand but himself. He chose to use it in each of these cases, and when he does, then he must pay the penalty for it.

You have already determined guilt in this case. That is not an issue. Your only concern is what is a just punishment.

As I indicated to you earlier, and as you took your oath, you took an oath that if a proper case is presented, each of you indicated to the Court when Judge Godwin asked the question, If a proper case is presented to you can you personally impose the penalty of death? And each and every one of you indicated yes.

Well, members of the jury, in this particular case the Commonwealth has presented to you a proper case for the death penalty. We have shown not only the facts of the McClelland case itself, but also the other brutal, vicious, and vile acts that this defendant has committed.

It seems to me that he has already been

Well, members of the jury, that's exactly what we have in this case. And based upon that testimony I ask you to find this defendant-- You have already found him guilty, and I ask you to impose a sentence of death; for I think the question that each of you must answer in this case is not whether you can live with yourselves if this defendant is sentenced to death. The question is, can you live with yourselves after hearing all the testimony, all the evidence, all the different crimes of murder and otherwise that this defendant has committed, can you live with yourselves if you don't? And that is the question.

Based on that I ask you to impose a sentence of death. If there was ever a case where it's justified the Commonwealth has presented it to you today and throughout this week.

Thank you very much.

THE COURT: All right, ladies and gentlemen, you can retire to your jury room to arrive at your verdict, taking with you the Court's instructions and exhibits admitted into evidence.

THE MEMBERS OF THE JURY PANEL RETIRED TO THEIR JURY ROOM TO BEGIN THEIR DELIBERATIONS AT 4:40 P.M.

THE COURT: Court stands in recess.

(The following was dictated to the court reporter out of the presence of the jury and the Court during the recess.)

BY MR. EASON:

Exceptions to the three instructions tendered to the Court but refused by the Court to be considered in the penalty phase: I respectfully request that our exception be noted to the refusal by the Court.

TRIAL CONTINUING IN THE COURTROOM.

THE COURT: Now, regardless of what jury verdict is brought in at this time, this case is not over. Now, I don't want any exclamation, I don't want any outbursts from anybody in the court-

room, whatever the verdict may be. Everyone will remain seated, except the officers, until the jury is completely out of the building.

I don't want anybody to have any contact with the jury. If it's reported that any member of the jury is harrassed by anybody the Court is going to deal with it very severely.

All right, bring the jury in, please.

THE MEMBERS OF THE JURY PANEL RETURNED TO THE COURTROOM AT 5:50 P.M. FOLLOWING THEIR DELIBERATIONS.

MR. MURDEN, CLERK: Ladies and gentlemen, have you arrived at a verdict in this case?

FOREMAN CULBERTSON: Yes, we have.

MR. MURDEN, CLERK: May I have it, please?

THE VERDICTS FORMS WERE PRESENTED TO THE COURT.

THE COURT: All right. Will you read the verdict, please?

MR. MURDEN, CLERK: "We, the jury, on the issue joined, having found the defendant guilty of capital murder and having unanimously found after

a consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

Signed, Lawrence E. Culbertson, Foreman.

Members of the jury, is this your verdict, and so say you all?

EACH MEMBER OF THE JURY PANEL ANSWERED AFFIRMATIVELY.

THE COURT: Would you like the jury polled, gentlemen?

MR. MOORE: Yes, Your Honor.

MR. MURDEN, CLERK: As I call your names if this is your verdict you will answer yes. If it is not, you will answer no.

Ruth Vann?

JUROR VANN: Yes.

MR. MURDEN, CLERK: Joyce McClenny?

JUROR MCCLENNY: Yes.

MR. MURDEN, CLERK: Dorothy Carr?

JUROR CARR: Yes.

MR. MURDEN, CLERK: Lorraine Gayle?

JUROR GAYLE: Yes.

MR. MURDEN, CLERK: Willie Nelms?

JUROR NELMS: Yes.

MR. MURDEN, CLERK: Clara Simpson?

JUROR SIMPSON: Yes.

MR. MURDEN, CLERK: Lawrence Culbertson?

FOREMAN CULBERTSON: Yes.

MR. MURDEN, CLERK: Cathy Ralston?

JUROR RALSTON: Yes.

MR. MURDEN, CLERK: Harvey Quimby?

JUROR QUIMBY: Yes.

MR. MURDEN, CLERK: John Riley?

JUROR RILEY: Yes.

MR. MURDEN, CLERK: Francis Fitzgerald?

JUROR FITZGERALD: Yes.

MR. MURDEN, CLERK: Robert Turner?

JUROR TURNER: Yes.

MR. MURDEN, CLERK: Have all the members of the jury been polled?

THE COURT: All right, ladies and gentlemen. It's been a long and difficult week. We appreciate your services, the time that you have given, and the effort that you have put forth in

No. 95- ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,

Respondent.

PROOF OF SERVICE

I, Paul G. Turner, counsel for Petitioner Coleman Wayne Gray, do swear that on this date, October 23, 1995, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

John H. McLees, Jr.
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for
Respondent - J.D. Netherland, Warden

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 23, 1995.

Paul G. Turner,
Counsel for Coleman Wayne Gray